Docket for 04-603

(10)

No. 04-603
Title: Grable & Sons Metal Products, Inc., Petitioner
v.
Darue Engineering & Manufacturing
Docketed: November 4, 2004
Lower Ct: United States Court of Appeals for the Sixth Circuit
Case Nos.: (02-1678)
Decision Date: July 27, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Oct 25 2004	Petition for a writ of certiorari filed. (Response due December 6, 2004)
Dec 1 2004	Brief of respondent Darue Engineering & Manufacturing in opposition filed.
Dec 13 2004	Reply of petitioner Gable & Sons Metal Products, Inc. filed. (Distributed)
Dec 15 2004	DISTRIBUTED for Conference of January 7, 2005.
Jan 7 2005	Petition GRANTED limited to Question one presented by the petition.
Feb 14 2005	Motion to dispense with printing the joint appendix filed by respondent.
Feb 22 2005	SET FOR ARGUMENT ON Monday, April 18, 2005
Feb 22 2005	Motion for leave to file amici brief filed by Jerome Milulski, et ux.
Feb 22 2005	Brief of petitioner Gable & Sons Metal Products, Inc. filed.
Mar 7 2005	Motion to dispense with printing the joint appendix filed by respondent GRANTED.
Mar 7 2005	Motion for leave to file amicus brief filed by Jerome Milulski, et ux. GRANTED.
Mar 9 2005	Record received from U.S.C.A. 6th Circuit. (1 binder)
Mar 11 2005	CIRCULATED.
Mar 18 2005	Record received from U.S.D.C. for the Western District of Michigan. (1 box)
Mar 24 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 28 2005	Brief of respondent Darue Engineering & Manufacturing filed. (Distributed)
Mar 29 2005	Brief amicus curiae of United States filed. (Distributed)
Mar 30 2005	Motion of Jerome Milulski, et ux. for leave to participate in oral argument as amici curiae and for divided argument filed.
Apr 1 2005	Petitioner's response to motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument.
Apr 4 2005	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 4 2005	Motion of Jerome Milulski, et ux. for leave to participate in oral argument as amici curiae and for divided argument DENIED.
Apr 11 2005	Reply of petitioner Gable & Sons Metal Products, Inc. filed. (Distributed)
Apr 18 2005	Argued. For petitioner: Eric H. Zagrans, Washington, D.C. For repsondent: Michael C. Walton, Grand Rapids, Mich.; and Irving L. Gornstein, Assistant to the Solictor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.)

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

OCTOBER, 2004 TERM

GABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Charles E. McFarland
Counsel for the Petitoner
338 Jackson Road
New Castle, KY
(502) 845-2754

Attorney for Petitioner

QUESTIONS PRESENTED

1. SUBSTANTIAL FEDERAL QUESTION AND ORIGINAL JURISDCITION PREREQUISITES FOR REMOVAL TO FEDERAL DISTRICT COURT

28 U.S.C. §1441(b) allows removal of any state civil action in which the district courts have original jurisdiction wherein the claim is founded on a right arising under the Constitution, treaties or laws of the United States. This Court has routinely held that such removal requires both a substantial federal question and the district court must have original jurisdiction over the action.

The question raised is, when there is a violation by the IRS of 26 U.S.C. §6335(a) by intentionally ignoring the prerequisite provision requiring personal service of notice of seizure before obtaining service by certified mail, whether the defendant in a state quiet title action can remove the action by claiming that the necessary interpretation of 26 U.S.C. §6335(a) as to whether strict compliance or substantial compliance with the statute constitutes a substantial federal question and creates original jurisdiction in the district court.

2. PERSONAL NOTICE PROVISIONS IN 26 U.S.C. §6335(A) REQUIRES: STRICT COMPIANCE AS OPPOSED TO SUBSTANTIAL COMPLAINCE

The courts from virtually the beginning of our country's history have maintained that governmental agents are required to strictly comply with the law when confiscating the property of citizens. A long line of cases have indicated that that IRS agents must strictly comply with the personal service of notice of seizure required by 26 U.S.C. §6335(a). Several Circuit Courts of Appeals have recently chosen to allow violations of said section when the IRS substantially complies with the provision.

The question presented is whether the IRS is required to strictly comply with the personal service provisions of 26 U.S.C. §6335(a), which requires attempted personal service of notice of seizure before the IRS can obtain service through certified mail or, is the IRS allowed to substantially comply with the provisions, especially when the IRS admittedly fails to even attempt to comply with personal service before obtaining service by certified mail.

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DISCLOSUE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERSTS

Pursuant to Sup. Ct. Rule 29.6 Garble & Sons Metal Products, Inc states:

1. It is not a subsidiary or affiliate of a publically owned corporation; and

2. There is no publicly owned corporation that is not a party to this petition that has an interest in the outcome.

The Petitioner respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The district court's order (per McKeague, D.W.) denying the petitioner's motion to remand (Appendix ("Pet.App.) C at 12) is unpublished. The district court's opinion granting judgment as a matter of law for Darue against Grable's action in quiet title is published at *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 207 F.Supp.2d 694, 697 (W.D. Mich 2002), Pet.App. B. The court of appeal's opinion (per Chief Judge Boggs, joined by Circuit Judge Daughtrey and District Judge Aldrich) affirming is published at *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 377 F.3d 592 (6th Cir. 2004), Pet.App. A at 1. A motion for rehearing was not made, nor was a stay of mandate sought.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on July 27, 2004. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of 28 U.S.C. §§1331, 1340, 1441(a), 1441(b) and 26 U.S.C. §6335 and 6339 are set forth in the body of the writ as needed.

ISSUE I

SUBSTANTIAL FEDERAL QUESTION AND ORIGINAL JURISDCITION IN DISTRICT COURT ARE PREREQUISITES FOR A STATE CASE TO BE REMOVED TO FEDERAL DISTRICT COURT

A. Statement of the Case.

The Petitioner, Grable & Sons Metal Products, Inc. (Grable), is a corporation organized under the laws of the State of Michigan, who initiated a quiet title action. The quiet title action arose under Michigan law and was filed against Darue Engineering & Manufacturing, Inc. (Darue).

Grable sought to quiet title to certain real estate located at 601-701 W. Plains Road in Eaton Rapids, Michigan. This property was allegedly seized by the IRS in 1994 to satisfy the corporation's tax debt. The Grable complaint, in addition to alleging a cause of action in quiet title, also stated that the IRS had failed to personally serve the corporation notice of seizure as required by 26 U.S.C. §6335(a). All the parties agree that the IRS failed to personally serve the corporation a notice of seizure. The IRS later purported to sell the property through an auction to Darue in 1994. The IRS provided Darue with a quitclaim deed dated November 13, 1995.

On December 14, 2000, the Petitioner filed a quiet title action in the Circuit Court for the County of Eaton in the State of Michigan. On January 16, 2001, Darue removed the quiet title action to the United States District Court in the Western District of Michigan, Southern Division. Grable sought a remand of the action, but the district court denied the request on April 2, 2001. The district court held that, due to the necessity of the interpretation of the requirements of 26 U.S.C. §6335(a), it had jurisdiction pursuant to 28 U.S.C. §1331 over the matter because there was a federal question involved.

Grable appealed to the Sixth Circuit Court of Appeals, which ruled that Grable had asserted a federal right which required the interpretation of a revenue law. Therefore, Grable's claim was a federal question rooted in the Internal Revenue Code.

The court of appeals decision to sanction the denial of a remand warrants this Court's immediate review because the decision sets forth a three part test for a federal question that is not consistent with the holdings of this Court. The decision eliminates the necessity of proving original jurisdiction thereby greatly expanding the limited jurisdiction of the federal district courts in removal situation. The decision also attempts to expand a simple violation of federal law into a substantial federal question, contrary to the holdings of this Court and at least one other United States Court of Appeals. By allowing the Sixth Circuit's decision to stand an open invitation is made for all litigants that they may now remove a state case with a federal question, or with just a violation of federal law, without having to show original jurisdiction in the district court. Such an open invitation will clog an already overburdened federal judicial system and is contrary to the guidance given by this Court's earlier decisions

The decision below conflicts with numerous decisions of this Court and at least one other circuit requiring evidence of original jurisdiction in the federal district court before a removal can stand.

B. Reasons for Granting the Writ.

The Petition for the Writ of Certiorari addresses the issue regarding the prerequisites of both a substantial federal question and original jurisdiction of the district court before removal of a state cause of action to a federal district court. The Writ should be granted for three reasons. *First*, the Sixth Circuit's affirming of a district court's denial of a motion to remand where there has been no showing of a substantial federal question and no showing of the district court's original jurisdiction has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a district court as to call for an exercise of this Court's supervisory power.

Second, the Sixth Circuit's decision to uphold a denial of a remand of a state cause of action where there is no substantial federal question or original federal jurisdiction conflicts with previous holdings of this Court.

Third, the decision to allow a removal of a state cause of action without the district court having original jurisdiction over the cause of action is in direct conflict with the 7th Circuit case of *Seinfeld v. Austin*, 39 F.3d 761, 764 (7th Cir. 1994) which requires a federal right of action as a prerequisite before a state case can be removed.

1. **The Sixth Circuit's Affirming of a District Court's Denial of a Motion to Remand Without Requiring the Defendant to Show a Substantial Federal Question and to Show Original Jurisdiction in the District Court Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings and Has Sanctioned Such a Departure by A District Court as to Call for an Exercise of This Court's Supervisory Power.**

Petitioner Grable filed a quiet title action in the State of Michigan alleging that the title to property it claimed was clouded by the claims of Darue. Within Grable's state quiet title action it was alleged that the cloud of title Darue held resulted from the IRS issuing a quitclaim deed based on a purported tax sale in which the IRS violated the personal service requirements as mandated in 26 U.S.C. §6335(a). Darue, using 28 U.S.C. §1441(b) as its source, removed the state quiet title action to the Western District of Michigan alleging that there was a substantial federal question involving the interpretation of the personal service requirements of 26 U.S.C. §6335(a). The district court denied Grable's motion to remand and the Sixth Circuit upheld that denial.

The actions and manner in which the Sixth Circuit arrived at its decision to uphold the denial of the remand have so far departed from the usual course of judicial proceedings and have permitted the Western District Court of Michigan to depart from the normal procedure so as to call for this Court's supervisory power to correct this departure. In essence, instead of addressing the jurisdictional statute that Darue relied upon to remove the state quiet title action and the district court upheld, the Sixth Circuit

mixed and matched several jurisdictional statutes to arrive at an incorrect and unsupported rationale to affirm the district court's denial of Grable's remand motion.

Under normal and accepted judicial process, when a plaintiff files a state cause of action in the state courts, the defendant has the option of removing the cause of action to a federal district court under the removal statutes provided by Congress in 28 U.S.C. §§1441(a) and (b).

28 U.S.C. §1441(a) in pertinent part states,

> "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

Through section 1441(a), Congress has permitted a defendant in a state case to remove any civil action to the district court, if the federal court has original jurisdiction. Apparently, the panel for the Sixth Circuit that upheld the district court's denial of Grable's request for a remand was confused as to the exact statute that Darue relied upon to remove the quiet title action to the district court. While Darue removed the quiet title action from state court to the district court based on 28 U.S.C. §1441(b), the Sixth Circuit panel cited 28 U.S.C. §1441(a), see the Sixth Circuit opinion, Pet.App. A, at 3.

The statute that Darue relied upon and the 6th Circuit should have addressed is 28 U.S.C. §1441(b).

Section 1441(b) in pertinent part states,

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without

regard to the citizenship or residence of the parties."

Through 28 U.S.C. §1441(b), Congress has permitted a defendant in a state case to remove any civil action which is founded on a claim or right arising under the Constitution, treaties or laws of the United States to the district court, if the federal court has original jurisdiction.

Whether 28 U.S.C. §1441(a) or §1441(b) is the proper jurisdictional foundation for removal in this case, certain legal principles remain the same. *First*, because the jurisdictional removal statutes implicate federalism concerns they must be construed narrowly, *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100,108-09, 61 S.Ct. 868, 85 L.Ed 1214 (1941). *Second*, one of the prerequisites of the removal statutes is that a defendant must show that the district court wherein removal is sought has original jurisdiction over the cause of action, *Syngenta Crop Protection v. Henson*, 537 US 28, 123 S.Ct. 366, 154 L.Ed2d 368, 371 (2002). *Third*, when removal is sought, the burden of proof is on the defendant to show that the district court does in fact have original jurisdiction, *Syngenta* supra, 154 L.Ed2d at 372.

The Sixth Circuit departed from the foregoing standard judicial process by broadly interpreting the jurisdictional statutes, by not requiring the federal district court to have original jurisdiction and by not placing the burden on the defendant to show the district court had original jurisdiction.

Rather than directly addressing the question raised on appeal by Grable, the 6th Circuit chose to develop an incorrect alternative rationale to justify its refusal to reverse the district court's decision to keep the removed case. The Sixth Circuit began its Federal Question Jurisdiction discussion, not only with the wrong removal statute 28 U.S.C. §1441(a), but also with an inapplicable jurisdictional statute. The panel initially recognized 28 U.S.C. §1331 as the correct judicial statute. Section 1331 reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." The language of section 1331 is basically the same as removal statute of section 1441(b).

The panel did not discuss or examine the applicability of section 1331 to the present case because, in the Sixth Circuit's view, section 1331 also gave original jurisdiction in addition to the jurisdictional statute it felt was more important. The panel chose to instead rely on 28 U.S.C. §1340 for original jurisdiction by stating, "The District courts have original jurisdiction over an civil action 'arising under any Act of Congress providing for the internal revenue ... .'" In opting to rely on 28 U.S.C. §1340 the Sixth Circuit departed from the widely accepted principle of construing the removal statutes narrowly, see *Shamrock Oil*, supra. In the process of attempting to broaden the scope for removal, the Sixth Circuit created a new and an independent original jurisdiction for the district court through 28 U.S.C. §1340. This new and independent jurisdiction through section 1340 is an issue of first impression before the United States Supreme Court.

Had the 6th Circuit followed the normal, accepted judicial reasoning associated with removal statutes it would have adopted a line of reasoning similar to the one below. By following this line of reasoning, or one parallel to it, the Sixth Circuit would have recognized immediately that section 1340 did not give the district court independent original jurisdiction. The line of reasoning is as follows:

Question, "Does this quiet title civil action arise under any Act of Congress providing for internal revenue?"

If the answer is no, the District Court lacked jurisdiction and the discussion is over.

In this case the action was a quiet title action arising from the laws of Michigan. Thus, the answer should have been no. The 6th Circuit, however, concluded that the answer was yes. Accordingly the next step in the line of reasoning to be followed is:

If the answer is yes, then the question is, "Under what Act of Congress does the action arise?"

This is where the Sixth Circuit falters. Neither Darue nor the Sixth Circuit can state what Act of Congress authorized the

civil action of quiet title. This is because Congress did not pass an act allowing for the private resolution of a quiet title between two private citizens of the same state.

So, even after the 6th Circuit has issued its opinion, the question remains, "What right or immunity was created by what Act of Congress providing for revenue, or for that matter any Act of Congress, constitutes Grable's alleged cause of action founded in quiet title?"

The Supreme Court has never specifically addressed 28 U.S.C. §1340, but several lower courts have. In *Young v. IRS*, 596 F.Supp. 141 (ND Ind. 1984), the district court stated, "The very language of the statute indicates that this section does not create jurisdiction in and of itself. Section 1340 makes it clear that the jurisdiction extends to civil actions arising under the Internal Revenue laws; as such, the suit must be based on some cause of action which the Internal Code recognizes and allows the plaintiff to bring. Absent some recognition of this kind of suit under the Internal Revenue Code, §1340 will not create an independent basis for jurisdiction. As one court has noted, "Given the implication which Article III of the Constitution places on the jurisdiction of the federal courts, it is doubtful that the various jurisdictional statutes [like §1340] could do more than waive the congressionally imposed jurisdictional amount requirement,'" citing *Crown Cork & Seal Co. v. Pennsylvania Human Relations Comm.*, 463 F.Supp. 120, 127 n.8 (ED Pa. 1979).

The *Young* court also stated, "If the plaintiff's claim comes outside the Code, then it logically cannot "arise under' the Code, and therefore §1340 cannot provide plaintiff with jurisdiction."

In this case Grable alleged a quiet title action under the laws of Michigan and outside of the Code. Indeed, there is no provision in the Code which recognized and allowed Grable to file a quiet title suit. Neither Darue nor the 6th Circuit were able to cite such a provision. All the Sixth Circuit panel could do was conclude that Grable's complaint hinged on a Violation of 26 U.S.C. §6335(a) and jump to the conclusion that the alleged violation created an action arising under the laws of the United States. But a mere violation of the law, even if it is the sole issue,

is not enough to create a cause of action, see *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463, U.S. 1, 77 L.ED2d 420, 193 S.Ct. 2841 (1983).

Neither 28 U.S.C. §1441(a), nor 28 U.S.C. §1340 are the applicable jurisdictional statutes in this case because Congress gave no jurisdictional authority for a quiet title action between two citizenship of the same state in federal courts. The only exceptions allowed for the district courts to exercise original jurisdiction in quiet title actions is that allowed by 28 U.S.C. §2409a and §2410. These two sections specifically waive the sovereign immunity of the United States in quiet title actions in which the United States claims an interest (§2409a), or, has or claims a mortgage or other lien (§2410). That neither of these two statutes is applicable in this case is was made perfectly clear in the response of the United States to Darue's third-party complaint in which the United States was named. The United States specifically stated that it neither claimed an interest in the property, nor did it have or claim a mortgage or other lien against the property. Had 28 U.S.C. §1441(a) been the proper statute then the Sixth Circuit would have had no choice but to remand because the federal courts have no original jurisdiction over quiet title actions between private citizens of a state.

Not only did the Sixth Circuit depart from the accepted rule of interpreting removal statutes narrowly, it also departed from the two requirements for removal regarding original jurisdiction in the district courts. The Supreme Court in *Syngenta,* supra clearly defined these requirements. The Sixth Circuit, however, neither required original jurisdiction, nor asked the Darue to shoulder its burden of proving that the district court had original jurisdiction. Thus, in its attempt to broaden the scope of the removal statutes to cover the perceived substantial federal interest in revenue, the Sixth Circuit departed from the principle that removal statutes must be interpreted narrowly. Accordingly, this Court should exercise it supervisory power and reverse the Sixth Circuit's upholding of the denial of a remand where there was no substantial federal question and where the district court had no original jurisdiction.

The bottom line is that the district court, with the Sixth Court's full approval, has made a decision to quiet a state quiet title claim which it had no jurisdiction or authority to do, especially where the United States is not a party that claims or has an interest in the property. Without jurisdiction to quiet title on state property the district court's opinion is void and has no binding affect in any other court. A Writ of Certiorari must be granted to review this type of abuse of jurisdiction.

2. **Certiorari Is Merited Because the Decision Below Conflicts With the Decision of Another United States Court of Appeals and With Decisions of This Court.**

The Sixth Circuit's decision to uphold a removal of a state quiet title action to the federal district court without requiring a substantial federal and original jurisdiction in the federal district court not only went against accepted procedure, but it was also in direct conflict with another United States Court of Appeals in violation of several decisions of the Court. After laying the foundation for its incorrect rationale that jurisdiction of Grable's state quiet title action is founded on 28 U.S.C. §1340, the Sixth Circuit addressed the question of whether the quiet title claim as filed by Grable represented a cause of action 'arising under' the laws of the United States. The resolution of this question determines whether there is a substantial federal question to support a removal under 28 U.S.C. §1441(b). The same resolution will also determine whether there is original jurisdiction under section 1331.

The Sixth Circuit claims, "The long history of Supreme Court guidance concerning the meaning of 'arising under' the laws of the United States has been synthesized into a three part test," see Pet.App. A, at 5. The court set forth its synthesized three part test:

> "..., a federal question may arise out of a state law case or controversy if the plaintiff asserts a federal right that 1) involves a substantial question of federal law; 2) is frame in terms of state law; and 3) requires interpretation of federal law to resolve the issue."

The Sixth Circuit cited three cases allegedly in support of the three part test: *Long v. Bando Manufacturing of America, Inc.*, 201 F.3d 754 (6th Cir. 2000); *Howery v. Allstate Insurance Co.*, 243 F.3d 912, 918 (5th Cir. 2001) and *Seinfeld v. Austin*, 39 F.3d 761 (7th Cir. 1994).

While the *Long* case and the *Howery* case are consistent with each other and with the synthesized three part test as developed by the Sixth Circuit, they are contrary to the full test as developed by the Supreme Court. They are also contrary to the third case cited by the Sixth Circuit, *Seinfeld v. Austen.*

The *Seinfeld* decision does not support just a three part test. Instead, the *Seinfeld* court adds a crucial element that must be present before a federal question can be considered a substantial federal question supporting a removal. The element the Sixth Circuit, the *Long* court and the *Howery* court neglected to apply is the Supreme Court requirement established through *Merrell Dow Parmaceuticals, Inc., v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed2d 650 (1986), that "if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question," *Seinfeld*, supra, 39 F.3d at 764. The *Seinfeld* court specifically adopted, "[a] deferral rule of decision is necessary but not sufficient for federal jurisdiction. There must also be a right of action to enforce to enforce that rule," *Seinfeld*, supra, 39 F.3d at 764.

The three part test the Sixth Circuit synthesized is not the complete test as developed by the Supreme Court because it omits the most crucial element of original jurisdiction in the district court. An analysis of several of this Court's decisions will clearly expose the fatal defect in the synthesized three part test.

This Court in *Franchise Tax Board*, supra, found that a state case could be removed if the complaint shows a cause of action arising under the Constitution or laws of the United States or it appears from the complaint that a substantial, disputed question of law that is essential element of the complaint. This Court also found, however, that merely the interpretation of a federal law, even if it is the only question to be decided, does not

make it a federal question. Contrary to *Franchise Tax Board*, the Sixth Circuit decision sets the stage for any question or interpretation of a federal law to be considered a federal question and as such, sufficient as grounds for removal.

This Court in *Merrell Dow*, supra, 478 U.S. at 813, adopted the principle that a suit arises under the law that creates the cause of action. The holding in *Merrell Dow* was, "We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States."

The *Long* court, supra 201 F.3d at 759 analyzed the *Merrell Dow* decision and felt that it was unclear. The *Long* court felt that *Merrell Dow* still left an opening for federal jurisdiction based on a substantial federal question of interest, even though there was no express or implied federal cause of action. The court felt that if the substantial federal interest was framed in terms of state law and the interpretation was necessary for the resolution of the state claim then there would still be federal jurisdiction.

This is not the view that the *Seinfeld* court understood. The *Seinfeld* court, in adopting the *Merrell Dow* position stated, "Under *Merrell Dow*, therefore, 'if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question,'" *Seinfeld*, supra, 39 F.3d at 764. Thus, the *Long* incorrectly interpreted *Merrell Dow*. It was the *Long* court's incorrect interpretation of *Merrell Dow* that the Sixth Circuit adopted to arrive at the conclusion that a simple substantial federal interest was enough to translate into a substantial federal question and district court original jurisdiction.

This Court in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523, 139 L.Ed2d 525 (1997) affirmed the requirement of original jurisdiction in the district court before a removal was proper. It stated, "The propriety of removal thus depends on whether the case originally could have been filed in federal court." The Court in *City of Chicago* also

required a substantial federal question and explained what it meant, "A federal question exists when a right or immunity created by the Constitution or law of the United States is an element, and an essential one of the plaintiff's cause of action," *City of Chicago*, supra, 139 L.Ed2d at 535.

The question was asked earlier, "What right or immunity was created by what Act of Congress providing for revenue, or for that matter any Act of Congress, constitutes Grable's alleged cause of action founded in quiet title?" According to this Court in *City of Chicago* it is the appropriate question to ask. The answer, however, cannot be found in the Sixth Circuit decision.

Other decisions of this Court serve to elucidate the principles behind the holdings of this Court. A three part test was set forth in *Wider v. Virginia Hospital Assn*, 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed2d 455 (1980) to determine if a violation of a federal right was present. One of the steps required the assertion of the violation of a federal right for purposes of a 1983 action. The *Wider* court looked to a previous holding when it quoted, "Section 1983 speaks in terms of 'rights, privileges, or immunities,' not violations of federal law, '" citing *Golden State Transit Co. v. Los Angelos*, 493 U.S. 103, 106, 110 S.Ct. 444, 107 L.Ed2d 420 (1989). *Golden State* gave a more complete explanation of a federal right. The Court stated, "In deciding whether a federal right has been violated the court must determine whether Congress intended the provision in question to creates obligations binding on the government or rather 'does no more than express a congressional preference for certain kinds of treatment," *Golden State*, supra, 107 L.Ed2d at 427.

In this case the decision of whether 26 U.S.C. §6335(a) creates a federal right hinges on whether the provision is mandatory on the government or it merely express a preference. If the requirements section 6335(a) merely expresses a preference as to the treatment of personal service in notifications of IRS seizure, then there is no federal right. The Sixth Circuit in its decision to deny Grable his quiet title relief made it clear that the requirements of 26 U.S.C. §6335(a) need only have substantial compliance. The mandatory nature of the personal service provisions was NOT what the Sixth Circuit had in mind when it ruled in favor of

substantial compliance. Accordingly, there was no federal right and the denial of the remand was improper.

If, however, the provisions of 26 U.S.C. § 6335(a) are mandatory as Grable believes they are, it does not necessarily mean that removal was proper. Something more than a federal right is required before removal may be proper. As was discussed above, that essential element that must be present in every removal is original jurisdiction in the federal district court, see *Syngenta*, supra. Without original jurisdiction there can be no removal authority. Neither Darue nor the Sixth Circuit have shown or established that section 6335(a) created any private federal cause of action for quiet title between two private citizens.

Two lower court cases illustrate this point perfectly. In the cases of *Little River Farms, Inc. v. United States*, 328 F.Supp. 476 (ND Ga. 1971) and *Popp v. Eberlein*, 409 F.2d 309 (7th Cir. 1969), both had federal rights but neither had a federal cause of action to enforce that right. Thus, the violations of federal law were unenforceable federal right and therefore, did not create substantial federal questions. In this case there may very well be a federal right, but it remains unenforceable in the federal court until the defendant shoulders its burden of showing that the district court had original jurisdiction for a quiet title action between to citizens.

All of the Supreme Court cases cited above require a substantial federal question, i.e. a right that can be enforced in federal court. In the *Franchise Tax Board* case there was a federal question, but it was not deemed removable because it was not actionable in federal court. In other words, the district court must have original jurisdiction. Even the *Long* case required a substantial federal question.

ISSUE II

PERSONAL NOTICE PROVISIONS IN 26 U.S.C. §6335(A) REQUIRE STRICT COMPIANCE AS OPPOSED TO SUBSTANTIAL COMPLAINCE

A. Statement of the Case.

The Petitioner, Grable & Sons Metal Products, Inc. (Grable), is a corporation organized under the laws of the State of Michigan, who initiated a quiet title action. The quiet title action arose under Michigan law and was filed against Darue Engineering & Manufacturing, Inc. (Darue).

Grable sought to quiet title to certain real estate located at 601-701 W. Plains Road in Eaton Rapids, Michigan. This property was allegedly seized by the IRS in 1994 to satisfy the corporation's tax debt. In the process the IRS, by its own admission, completely failed to comply with the personal notice provisions in 26 U.S.C. §6335(a). Instead, the IRS opted to give notification by certified mail, which is the secondary method of service allowed by section 6335(a) to be exercised only after personal service failed.

The IRS later purported to sell the property through an auction to Darue in 1994. The IRS then provided Darue with a quitclaim deed dated November 13, 1995.

On December 14, 2000, the Petitioner filed a quiet title action in the Circuit Court for the County of Eaton in the State of Michigan. After a denial of Grable's motion to remand the case was heard in a summary manner based briefs by the parties and oral arguments as there was no substantial dispute as to the factual issues in the case. The district court ruled that the IRS' failure to comply with the personal service requirements of 26 U.S.C. §6335(a), but rather obtain service with certification by mail, constituted substantial compliance under 26 U.S.C. §6339(b)(2) and was sufficient to render the quitclaim deed to Darue valid.

Grable appealed to the Sixth Circuit Court of Appeals, which affirmed the district court's ruling the certified mail service

without compliance with the personal service requirements was substantial compliance with 26 U.S.C. §6335(a). Grable now seeks a Writ of Certiorari for the Supreme Court to review this issue.

The decision below conflicts with numerous decisions of other circuits requiring strict compliance with the personal service requirements of 26 U.S.C. §6335(a). The issue of strict compliance verses substantial compliance in relation to 26 U.S.C. §6335(a) is a case of first impression for the Supreme Court.

The court of appeals decision to uphold the district court's sanctioning of the IRS' complete failure to perfect a seizure by complying with certain personal service requirements for notice of an IRS seizure in 26 U.S.C. §6335(a) also flies in the face of this court's strong admonitions not to call the government agents to the task of obeying the law. It also goes against the grain of this Court's refusal to interpret one part of a statute in a manner that renders another part useless or superfluous. Allowing the Sixth Circuit's decision to stand is an open invitation for any government agent who thinks he can make a short cut in the agency's legal procedures as mandated by statute to ignore various portions of the statutes. Such an open invitation will clog an already overburdened federal judicial system to review the actions of government agents, especially IRS agents, who thought that a particular portion of the law was not needed. Such a path is contrary to the guidance given by this Court's earlier decisions.

B. Reasons for Granting the Writ.

The Petition for the Writ of Certiorari also addresses the issue regarding treating the complete failure of the IRS to comply with prerequisite personal service notice of an IRS seizure as substantial compliance because service by certified mail was made. The Writ should be granted for two reasons. *First,* the decision to allow a treat the non-compliance by the IRS of the personal service requirements of 26 U.S.C. §6335(a) as substantial compliance conflicts with numerous holdings in other United States Courts of Appeals.

Second, the Sixth Circuit's affirming of a district court's sanctioning of the IRS' complete failure to comply with the

personal service requirements of 26 U.S.C. §6335(a) as sufficient compliance because service by certified mail was accomplished so far departs from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a district court as to call for an exercise of this Court's supervisory power.

1. Certiorari Is Merited Because the Decision Below Conflicts With the Decision of Another United States Court of Appeals and With Decisions of This Court.

Real estate property of Grable was allegedly seized in 1994 by the IRS. The personal service of the notice of seizure as required by section 6335(a) was intentionally omitted by the IRS in favor of serving Grable by certified mail. The property was purportedly sold at auction to Darue and a quitclaim deed was executed in November of 1995.

In December of 2000, Grable filed a quiet title action to remove the cloud on the title caused by Darue's quitclaim deed from the IRS. Grable maintained the purported tax sale was void *ab initio* and the resulting quitclaim deed was invalid as a conveyance due to the IRS' failure to comply with the personal service requirements of section 6335(a). The district court upheld the IRS' failure and the Sixth Circuit affirmed the holding stating that the IRS did not have to strictly comply with the personal service requirements. As long as Grable had actual notice pertaining to the purported seizure and impending sale, in this case through certified mail, the IRS substantially complied with the provisions of the statute.

In its decision the Sixth Circuit had the opportunity to examine other circuit opinions. There was and is a split among circuits that have considered the issue of requiring the IRS to strictly comply with the personal service of notice provisions of 26 U.S.C. §6335(a) as opposed to allowing the IRS to substantially comply with this the personal service provisions.

On one side of the issue there is only one published circuit decision that supports the application of substantial compliance when there is a failure on the part of the IRS to comply with the personal service of notice required by section 6335(a). That case is

Kabakjian v. United States, 267 F.3d 208, 213 (2001). The Third Circuit in *Kabakjian* held that the notices "were not so defective as to void the seizure of property and its transfer to third parties" because § 6339(b)(2) allowed for substantial compliance. *Ibid.*

On the contra side of the issue there are several circuits that hold the IRS to strict compliance with the personal notice provision of section 6335(a). The leading case is *Reese v. Scoggins*, 506 F.2d 967, 969 (5th Cir. 1975). The Reece court cited the long standing rule that government agents must have accountability. The main rationale behind the *Reece* court's holding was a recognition of the "Damoclean nature" of the IRS' ability to seize property to satisfy legitimate tax deficiencies and of the importance of strict adherence to the statute to protect the taxpayer," *Reece*, supra, 506 F.2d at 971.

Other circuits have come to similar conclusions: *Goodwin v. United States*, 935 F.2d 1061, 1064 (1991) (noting government concession that the literal meaning of the statute requires personal service and requiring strict compliance with § 6335 notice requirements); *Aqua Bar & Lounge, Inc. v. United States Dept. of Treasury*, 539 F.2d 935, 939 (2d Cir. 1976) (same); *Kulawy v. United States*, 917 F.2d 729, 734-35 (2nd Cir. 1990) (same); *Johnson v. Gartland*, 470 F.2d 1104, 1106 (4th Cir. 1973) (non-compliance only allowed because the sale was validated through the ratification of the taxpayer); *Powelson v. United States*, 979 F.2d 141, 143 (9th Cir. 1992) (Language of §6335 requires IRS to be accountable); *Philadelphia & Reading Corp. v. United States*, 944 F.2d 1063, 1072 (3rd Cir. 1991) (Assessment illegal when IRS not in strict compliance with notice requirements); and *Robinson v. United States*, 920 F.2d 1157, 1161 (3rd Cir. 1990).

Even the Sixth Circuit was previously in line with the need for the IRS to strictly comply with the notice requirements of section 6335(a), see *McAndrews v. Belknap*, 141 F.2d 111, 115 (6th Cir. 1944) (Burden of showing literal compliance is on the purchaser); and *Verba v. Ohio Cas. Ins. Co.*, 851 F.2d 811, 816 (6th Cir. 1988). (Attempting twice to notify the taxpayer in person of the public sale of his property, and then sending a certified letter, which was returned, and a regular letter, which was not, is insufficient notice to validate the tax sale).

A Writ of Certiorari is required to resolve this conflict between the circuits for two reasons. *First*, The Supreme Court has never addressed the issue of strict literal compliance as to substantial compliance with regard to the personal service notice requirements of section 6335(a). *Second*, the issue needs to be resolved before more circuit courts allow the IRS to haphazardly comply with its own Code.

2. The Sixth Circuit's Affirming of a District Court's Allowing the Complete Failure of the IRS to Comply With the Personal Service Requirements of 26 U.S.C. §6335(a) in Favor of Service by Certified Mail Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings and Has Sanctioned Such a Departure by A District Court as to Call for an Exercise of This Court's Supervisory Power.

In the immediately preceding discussion its appears that there is far more support for requiring the IRS to strictly comply with the IRC provisions than there is support for allowing the IRS to substantially comply with them. As the following will show, there is solid ground for this.

There are two primary statutes involved in this issue. 26 U.S.C. §6335(a) reads:

> (a) **Notice of Seizure**. – As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of

personal property, a description with reasonable certainty of the property seized.

The second is 26 U.S.C. §6339(b) which reads in pertinent part:

> **b) Deed of real property.**--In the case of the sale of real property pursuant to section 6335 --
>
> (1) **Deed as evidence**,--The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and
>
> **(2) Deed as conveyance of title.**--If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

The language of both statutes is clear and unambiguous in that both require certain prerequisites to be performed or to exist before the balance of the statute is applicable.

In section 6335(a), the first sentence of the section specifically requires the IRS to personally serve the taxpayer with notice of the IRS seizure, or to leave the notice at the taxpayers abode or place of business, if either are in that internal revenue district. Only after the provisions of the first sentence cannot be complied with, for any number of reasons, is the IRS authorized to service the notice of seizure via certified mail.

In section 6339(b), the first subsection states that the deed provided by the IRS (in this case it was a quitclaim deed) shall be *prima facie* evidence that the IRS complied with all of the requirements and prerequisites for the sale of the property. It should be noted that the deed is only *prima facie* evidence. Iit is not conclusive evidence as the Sixth Circuit seems to believe, see

Pet.App. A at 9. *Prima facie* evidence by definition means that the evidence will hold true unless otherwise shown not to be true.

Subsection (b)(2) gives the deed issued by the IRS the validity to operate as a conveyance of property, if it can be shown that the Secretary (IRS) substantially complied with the provisions of the law in the course of the proceedings to sale the property. Note that subsection (b)(2) is connected with subsection (b)(1) by the conjunction 'and.' This means that both subsections (b)(1) and (b)(2) must be true before a tax deed issued by the IRS for property sold at a tax sale can be deemed valid to convey the property.

If evidence is shown that defeats the *prima facie* nature of the evidence (subsection (b)(1)) or evidence is shown that the IRS did not substantially comply with the law in the sale proceedings (subsection (b)(2)) then the deed cannot be deemed to be a valid conveyance of property.

When Grable filed its quiet title action in state court it alleged that the IRS did not comply with the personal service provisions of section 6335(a). By its own admission, and all parties are in agreement, the IRS did not even attempt to comply with the first sentence of section 6335(a) which requires personal service of the notice of seizure, or notice left at the taxpayer's abode or place of business, before service can be made through certified mail. This admission destroys the *prima facie* nature of the deed.

Furthermore, this is not a case of the IRS attempting to serve a taxpayer and not being able to do so. It is a case of the IRS choosing to ignore the personal service requirements of section 6335(a). Therefore, it is not a technical mistake, but an intentional one. As a result of the IRS' intentional disobedience to the law, it cannot therefore be considered substantial compliance.

In any event, the district court, with the Sixth Circuit affirming it, has chosen to apply the substantial compliance provisions of section 6339(b)(2) to indorse the IRS' complete and intentional failure to comply with prerequisite provisions of section 6335(a). Such a decision goes against this Court's time honored pledge to hold the governmental agents accountable to the law.

The circuit courts that require strict compliance, as listed above have determined that substantial compliance is not acceptable in the context of a tax seizure. This view follows that of Chief Justice Marshall that the "person invested with such a power [to convey land] must pursue with precision the course prescribed by the law, or his act is invalid ... ." *Thatcher v. Powell*, 19 U.S. (6 Wheat.) 119, 125 (1821).

The courts that have chosen to depart from this time honored requirement have followed a treacherous and devious path that does two things. *First*, they have chosen to interpret a portion one statute taken out-of-context, 26 U.S.C. §6339(b)(2), and apply it in such a manner as to render another portion of statute, the first sentence of section 6335(a), superfluous, ineffective and unnecessary. This Court is extremely reluctant to allow such an interpretation, see *Franchise Tax Board,* supra, 77 L.Ed2d at 436. see also *Freytag v. Commissioner of Internal Revenue,* 501 U.S. 868, 111 S.Ct. 2631, 115 L.Ed2d 764 (1991) wherein the Court reaffirmed that "courts 'are not at liberty to create an exception where Congress has declined to do so.'"

What is especially troublesome about this case is that the Sixth Circuit recognized the correct rule, see Pet.App. A at 8. Yet, even though the court acknowledged what the correct application of law was, it was not persuaded that it should follow it. This type of deliberate deviation from accepted legal principles is one of the primary reasons why a Writ of Certiorari must be granted.

In this case Congress has determined that the IRS shall first personally serve, or attempt to personally serve, notice of an IRS seizure of the taxpayer. If such an attempt fails, then the IRS is allowed to attempt service by way of certified mail. The facts in this case indicate that the IRS did not even attempt to comply with the personal service of notice provisions. The decision of the Sixth Circuit allows such total defiance of the law and thereby makes an exception to serving the taxpayer personally where Congress made it a requirement in direct violation of the *Freytag* principle.

Second, the circuit courts adopting the substantial compliance alternative, including the Sixth Circuit, have chosen to support violation of the law through equity. In this case, it is not

just a technical violation of the law, but a complete and intentional violation. This Court has continually forbidden courts from resorting to equity to justify a violation of the law. This Court in *Reno v. Bossier Parish School Bd*, 520 U.S. 471, 117 S.Ct. 1491, 137 L.Ed2d 730, 746-747 (1997) stated, "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can the courts of law." As the Court in *Freytag*, supra, warned, *Reno* also strongly cautions, lower courts cannot and should not search for reasons for what Congress has plainly done. In this case Congress has plainly and clearly required the IRS to attempt personal service of a notice of seizure before making service via certified mail. The Sixth Circuit would allow the requirement of Congress to be ignored by the IRS.

The procedure that the Sixth Circuit used to deviate from the long standing tradition of strict compliance is also in direct conflict with the admonition in *Great-West Life & Annuity Insurance Co. v. Knudson,* 534 U.S. 204, 122 S.Ct. –, 151 L.Ed2d 635, 647-649 (2002). There this Court frowned on the practice and procedure of some courts that look to the basic purpose of the statute when the language of the provision is clear and unambiguous. This Court in *Great-West Life*, supra, 151 L.Ed2d at 649, made it clear, "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the specific issue under consideration."

Finally, this Court has indicated that the court is not in the position to make changes in the law. Congress is in the position to make such changes. Accordingly, though equity is flexible, it must be confined within certain limits. One particular limit is that equity should never be used to sanction the violation of a law or provision of law. See *Grupo-Miexicano de Desarrollo, v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed 2d 319, 333, (1999).

The Sixth Circuit by permitting the district court to sanction a violation of the law has departed far from the accepted standard that this Court requires in adjudicating issues of the law. Accordingly, a Writ of Certiorari must be granted so that this Court can exercise its supervisory powers to bring the Sixth Circuit in line with the traditional and accepted interpretation of the law.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted

Charles E. McFarland
Counsel for the Petitioner
338 Jackson Road
New Castle, KY 40050
(502) 845-2754

APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DECIDED AND FILED: July 27, 2004

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-1678

GABLE & SONS METAL PRODUCTS, INC.,

Plaintiff-Appellant.

v.

DARUE ENGINEERING & MANUFACTURING,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Michigan at Grand Rapid.
No. 01-00037 – David W. McKeague, District Judge*.

Argued: March 9, 2004

Decided and Filed: July 27, 2004

Before: BOGGS, Chief Judge; DAUGHTREY, Circuit Judge; and ALDRICH, District Judge.

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* The Honerable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

ARGUED: Charles E. McFarland, Campbellsburg, Kentucky, for Appellant., Michael C. Walton, RHOADES, McKEE, BOER, GOODRICH & TITTA, GRAND Rapids, Michigan, for Appellee, ON BRIEF: Charles E. McFarland, Campbellsburg, Kentucky, for Appellant., Michael C. Walton, RHOADES, McKEE, BOER, GOODRICH & TITTA, GRAND Rapids, Michigan, for Appellee,

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OPINION

BOGGS, Chief Judge. Grable & Sons Metal ProductsInc., ("Grable") argues that the district court committed two errors in granting judgment to Darue Engineering & Manufacturing ("Darue") in Grable's action to quiet title against Darue. First, Grable argues that its claim, although based on federal tax law, does not present a federal question, and, therefore, that the district court did not have subject jurisdiction to adjudicate the case after Darue remove it from Michigan state court. Secondly, Grable appeals the district court's judgment denying its quiet-title claim in property Darue had purchased at a tax sale after the IRS seized it from Grable in 1994.

Granble's quiet-title action is based on provisions of the Internal Revenue Code concerning proper procedures for notifying delinquent taxpayers that their property has been seized. Its claim implicates a substantial federal interest, thereby presenting a federal question. Furthermore, the district court correctly denied Grable's action because the Internal Revenue Code allows for substantial, rather than literal, compliance with regulations regarding tax-seizure notification. Neither federal law nor principles of equity supports Grable's claim, asserted six years after the sale of its property, that notice by certified mail, rather than in person, rendered the IRS sale to Darue invalid. Accordingly, we affirm the judgment of the district court in its entirety.

I

The facts in this case are not disputed. In 1994, the IRS seized property at 601-7-1 W. Plains Road, in Eaton Rapids, Michigan, to satisfy Grable's tax debt resulting from not paying its corporate income taxes for six years. The IRS served notice of the seizure by certified mail, although 26 U.S.C. § 6335(a), the relevant statute, provides that notice must be "given" personally to the owner of the property. The parties agree that the IRS failed to adhere to the exact provisions of the statute but that Grable nevertheless received actual notice of the seizure. The IRS sold the property to Darue on December 13, 1994, for $44,500. The record before us contains no clear evidence that Grable challenged the sale at the time or attempted to redeem the property at issue in this case. Following its standard procedure, the IRS executed a quitclaim deed to Darue on November 13, 1995.

On December 14, 2000, about six years after Darue bought the property, Grable challenged the sale in Eaton county circuit Court by filing a quiet-title action. Darue removed the case to the United States court for the Western District of Michigan under 28 U.S.C. § 1441(b). Grable filed a motion to remand based on lack of subject matter jurisdiction, 28 U.S.C. § 1447(c). The district court held that it had jurisdiction to hear the case because the application of § 6335(a) implicates a substantial federal interest, meaning that Grable's claim was based on a federal question. On March 29, 2002, the district court denied Grable's motion to quiet title and awarded judgment to Darue. Grable appealed to this court in a timely manner.

II

Federal Question Jurisdiction

A defendant may remove to federal district court "any civil action brought in a state court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). District courts have original jurisdiction over any civil action "arising under any Act of Congress providing for internal revenue...." 28 U.S.C. § 1340. This court reviews district court decisions regarding subject matter jurisdiction *de novo*. *Caudill v.*

N. Am. Media Corp., 200 F.3d 914, 916 (6th Cir. 2000). Because we may not rule on the merits of a case over which a district court did not have subject matter jurisdiction, we must decide that issue first. *See Thomas v. United States*, 166 F.3d 825, 828 (6th Cir. 1999). The parties do not have diversity of citizenship, 28 U.S.C. § 1332(a), nor is the United States a party to this action.[1]

Federal courts also have original jurisdiction over claims "arising under the Constitution, laws, or treaties of the United states." 28 U.S.C. § 1331. Whether a claim presents a federal question "must be determined from what necessarily appears in the plaintiff's statement of his own claim." *Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914). In its original complaint to quiet title, Grable alleged that Darue's quitclaim deed was invalid because it "was given with improper notice pursuant to 26 U.S.C. § 6331 *et seq* .... [and] since the tax deed was given pursuant to improper notice as required by 26 U.S.C. § 6335(a), said transfer and claim through the tax deed is null and void *ab initio*." The key question is whether Grable's quiet-title action, based as it is on the faulty process in a tax seizure, "arises under" federal law and thus invokes federal court jurisdiction. We hold that it does.

The statute upon which Grable bases his complaint reads:

> As soon as practicable after seizure of property, notice in writing shall be given by the secretary to the owner of the property ... or *shall be left at his usual place of abode or business* if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling place or place of business within such district, the notice may be mailed to his last known address.

26 U.S.C. § 6335(a) (emphasis added). The parties agree that the IRS failed to "give" or "leave" notification and that therefore the service of notice did not comply with the statute. *See Goodwin v.*

[1] In order to be a party to a quiet title action, the United States must have an interest in the property, which it no longer has in this case. 28 U.S.C. § 2410(a).

United States, 935 F.2d 1061, 1064 (1991) (noting government concession that the literal meaning of the statute requires personal service); *Howard v. Adle*, 538 F.Supp. 504, 507 (E.D. Mich. 1982) (demonstrating that the certified mailing is insufficient for compliance with the statute by quoting 26 C.F.R. § 301.6335-1(b)(1)(1981) and IRS Manual § 5356.1(2)(1980); the latter specifies that the "original notice of sale will be delivered to the taxpayer personally"). Although Grable's complaint hinges on a violation of the Internal Revenue code, Grable insists that its cause of action does not arise under federal law.

The long history of Supreme Court guidance concerning the meaning of "arising under" the laws of the United States has been synthesized into a three part test. Although formulations differ slightly among the circuits, a federal question may arise out of a state law case or controversy if the plaintiff asserts a federal right that 1) involves a substantial question of federal law; 2) is framed in terms of state law; 3) requires interpretation of federal law to resolve the case. *Long v. Bando Mfg. of America*, 201 F.3d 754, 759 (6th Cir. 2000); *see e.g., Howery v. Allstate Insurance Co.*, 243 F.3d 912, 918 (5th Cir.), *cert. denied*, 534 U.S. 993 (2001); *Seinfeld v. Austin*, 39 F.3d 761, 763 (7th Cir, 1994), *cert. denied sub nom. Abbot Labs v. Seinfeld*, 514 U.S. 1126 (1995). The asserted federal right in this case, personal notification of seizure of property as provided by IRS regulations, fulfills these three requirements.

Substantial Federal Interest

To identify a federal question, we must make "a pragmatic assessment of the nature of the federal interest at stake," *Howery* 243 F.3d at 917 (citing commentators), a simple task in this context. The federal government cannot function without effective tax collection. *See United States v. Kimbell Foods*, 440 U.S. 715, 734 (1979) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425, 428, 431 (1819)). Society has a strong interest in clear rules for handling delinquent taxpayers. The IRS must have transparent procedures for seizing and selling property so that people will be willing to purchase property at tax sales, allowing the IRS to provide a predictable stream of tax revenue. Determining the scope of the IRS's authority to seize property to

satisfy a tax debt undoubtably implicates a substantial federal interest.

Presentation as a sate law claim

Grable sued to quiet title, which is generally a state law cause of action. However, the scope of a taxpayer's right to due process in the form of notice of the tax seizure and sale is the essential element of this claim. Grable would not have any cause of action, and Darue would have undisputed title to the property, were it not for the technical notice requirements of § 6335(a). Therefore the Internal Revenue Code, not state property law, lies at the center of this dispute. The state and federal claims are sufficiently entwined to allow us to find that Grable has presented a federal question.

Interpretation of the federal law required

Disposition of all the aspects of this case, including those related to the traditional state law property issues, turn on construction of federal tax law. Both parties agree that the only way to resolve the underlying controversy is to evaluate whether § 6335(a), which mandates notice for IRS seizure of property for non-payment of taxes in person, requires strict, or merely substantial, compliance with its provisions to allow the IRS deed to convey title. If strict compliance is necessary, then Grable is entitled to get his property back because the IRS did not comply with the letter of the law. If substantial compliance is sufficient, then further analysis and weighing of the equities of the situation is required. Therefore the final requirement is met: interpretation of the federal tax code is necessary to resolve the state law issue.

In sum, Grable's quiet title action presents a federal question because it is rooted in the Internal Revenue Code, the correct interpretation of which represents a substantial federal interest.

III

Action to Quiet Title

The district court also correctly granted summary judgment to the appellee, Darue. At issue is whether serving notice through a certified letter, which Grable in fact received, constitutes sufficient compliance with the statute to make the resulting quitclaim deed valid. Evaluating whether substantial compliance is applicable is a question of law that is reviewed *de novo*. *In re Eagle-Picher Indus., Inc.* 285 F.3d 522, 527 (6th Cir. 2002) (applying substantial compliance analysis to notice requirements in a bankruptcy case). However, the rule itself is an equitable doctrine, so that a district court's decision to apply it is reviewed for abuse of discretion. *Id.* At 529. *See Cleveland Guild Local 1 v. Plain Dealer Pub. Co.*, 839 F.2d 1147, 1155 (6th Cir. 1988).

The Internal Revenue Code states that:

> **b) Deed of real property.**--In the case of the sale of real property *pursuant to section 6335* --
>
> . . .
>
> **(2) Deed as conveyance of title.**--If the proceedings of the Secretary as set forth have been *substantially in accordance with the provisions of law*, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

26 U.S.C. § 6339(b)(2) (emphasis added). Therefore, if the IRS substantially complied with the provisions of § 6335(a), then the tax sale is valid.

Grable counsels against reading the substantial compliance provision of § 6339(b)(2) as applying to § 6335(a) seizures, in spite of the statutory language to the contrary, since doing so

would render the notice provisions "totally ineffective." Appellant Br. At 31. This argument is not persuasive. Grable is correct that a basic rule of statutory construction mandates that a court should read statutes as a whole and not interpret one provision in a way that would render another meaningless or superfluous. *Beck v. Pripis*, 529 U.S. 494, 506 (2000) (calling the rule a "longstanding canon of statutory construction'); *Lake Cumberland Trust v. EPA*, 954 F.2d 1218, 1222 (6th Cir. 1992).

Allowing substantial compliance does not undermine the purpose of § 6335(a), nor make its provisions superfluous. Should the IRS fail to adhere to the strict statutory notice provisions, it then has the burden of showing it substantially complied with them. Proving that a recalcitrant taxpayer actually received notice of a seizure or sale could be quite difficult. No court would uphold a seizure without notice. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (stating that "there can be no doubt that a minimum [the due process clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case").

Ignoring the provisions of § 6335(a), puts the IRS at risk that a court will find its alternative notification procedures inadequate and invalidate the tax sale. Gauging how much variation will be tolerated puts the IRS in very uncertain territory. For instance, a simple public announcement of a tax sale, as provided for in 26 U.S.C. § 6335(b), is "constitutionally inadequate." *Verba v. Ohio Cas. Ins. Co.*, 851 F.2d 811, 816 (6th Cir. 1988). Attempting twice to notify the taxpayer in person of the public sale of his property, and then sending a certified letter, which was returned, and a regular letter, which was not, is insufficient notice to validate the tax sale. *Reese v. Scroggins*, 506 F.2d 967, 969 (5th Cir. 1975). Nor will a court be swayed by the facts that the taxpayer received notice of the initial property seizure and found out about the auction before the bidding began. *Ibid.* Adjudication of substantial compliance cases is very fact-specific, and the outcome is uncertain for the litigants. We do not believe that the latitude allowed by § 6335(b)(2) undermines the strong motivation for the IRS to follow the letter of § 6335(a). Only by doing so can it ensure the validity of its tax sales, effectively collect back taxes, and avoid litigation.

The Third Circuit approved the application of the substantial compliance doctrine to § 6335(a) in *Kabakjian v. United States*, 267 F.3d 208, 213 (2001), a case that is directly on point, and upon which the district court relied. Like Grable, Kabakjian owed the IRS taxes, and his property was seized and sold at auction. He sued the government, claiming that the notices he received pursuant to § 6335(a) were defective because he received them by certified mail, rather than personal delivery. The Third Circuit held that the notices "were not so defective as to void the seizure of property and its transfer to third parties" because § 6339(b)(2) allowed for substantial compliance. *Ibid.* Because Kabakjian could not demonstrate any prejudice beyond a theoretical deprivation of his right to notice, the court ruled that all his property rights had transferred to a third party, and his claim failed on the merits. *Ibid.*

Protecting the interests of bona fide purchasers is an important aspect of quiet title analysis. In the one opportunity the Sixth Circuit has had to address the question of substantial compliance in the context of a tax seizure and sale, we too held that procedural irregularities could not void a tax sale. *PM Group Inv. Corp. v. PYK Enter.*, No. 97-1335, 1998 WL 242337, at **3 (6th Cir. May, 1998) (unpublished opinion) (holding that issuance of a certificate of sale was conclusive evidence of the regularity of the sale). We noted that § 6339(b)(2) was enacted to protect bona fide purchasers, such a Darue in this case. *Ibid.* (citing *United States v. Whitting Pools*, 426 U.S. 198, 211 (1983)).

Grable argues that "provisions of law" in § 6339(b)(2) means provisions of state law, citing *Fuentes v. United States*, 14 Cl.Ct. 157, 167 (1987), and, therefore, that strict adherence to the statute is required. *Fuentes* dealt with a homeowner's suit against the IRS for delivering a quitclaim deed that was invalid under Puerto Rican law. The Court of Claims noted "that a sharp focus must be placed on the distinction between the law applicable to the efficacy of a tax sale and the law applicable to the execution of a deed stemming therefrom. As to the former, local law governs." *Id.* At 166. This case deals with the efficacy of the tax sale, rather

than the validity of the deed,[2] and thus a question of federal law. *See also Reece*, 506 F.2d at 970 (holding that faulty notice provisions made the *sale* voidable *ab initio*) (emphsis added). We also adopt the district court's analysis rejecting Grable's reading of *Fuentes*. The district court correctly pointed out that the substantial compliance language of § 6339(b)(2) does not refer to the execution of the deed, but rather to the *proceedings* by which the Secretary sells real property pursuant to § 6335, and therefore the statute directly contradicts Grable's theory that that the substantial compliance provisions only applies to state law. *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 207 F.Supp. 2d 694, 697 (W.D. Mich 2002) (emphasis in the original).

Some courts have determined that substantial compliance is not acceptable in the context of a tax seizure. This view follows that of Chief Justice Marshall that the "person invested with such a power [to convey land] must pursue with precision the course prescribed by the law, or his act is invalid . . . ." *Thatcher v. Powell*, 19 U.S. (6 Wheat.) 119, 125 (1821). In *Reece v. Scroggins*, the leading case advocating strict construction, the court voided a tax sale because the IRS "handled this sale of land in a somewhat casual fashion," including failure to comply with notice requirements and irregularities in the subsequent public action. *Reece*, 506 F.2d at 970. The main rationale behind the court's holding was a recognition of the "Damoclean nature" of the IRS's ability to seize property to satisfy legitimate tax deficiencies and of the importance of strict adherence to the statute to protect the taxpayer. *Id. At 971;* Aqua Bar & Lounge, Inc. v. United States Dept. of Treasury, 539 F.2d 935, 939 (2d Cir. 1976) (same).

In this case, however, Grable was amply protected. It received actual notice of tax sale, which was one of several resulting from a six-year hiatus from paying taxes. It has not alleged any actual prejudice as a result of receiving notice through certified mail, nor did it take any action against Darue for six years. The protections in the statute are designed to prevent the

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[2] *See* Robert Kratovil, *Real Estate Law* 49 (6th ed. 1974) (explaining that a "quitclaim deed purports to convey only the grantor's *present interest in the land*, if any, rather than the land itself . . . . If he has no interest, none will be conveyed.") (Emphasis in original.)

government from seizing property without warning. The district court did not err in refusing to extend these protections to a delinquent taxpayer who knew that its property was being seized but waited years to assert its rights.

Although the statute allows for substantial compliance, the district court also analyzed the case under equitable principles, coming to the same conclusion for Darue. Because we may affirm the district court on any ground supported by the record, we do not have to review the district court's application of equity, *Shaw v. Deaconess Hosp.*, 355 F.3d 496, 498 (6th Cir. 2004), but we make two short points. In a case with similar defects in notice, the United States District Court for the eastern District of Michigan applied equity in holding that substantial compliance was sufficient to validate the sale. *Howard*, 538 F.Supp. at 508 (applying Michigan law to resolve the quiet title action). Secondly, the district court's decision to apply equity to dismiss Grable's quiet title action does not contradict an earlier Michigan Court of Appeals quiet-title action that was decided in Grable's favor. *Village of Dimondale v. Grable*, 618 N.W.2d 23 (Mich.App. 2000). In defending an action to quiet title to another piece of property that Mr. Grable owned personally, he argued that the tax sale was not valid because of defective IRS notice. The state appeals court held that, as a defendant, he did not have to worry about sleeping on his rights but was entitled to assert any valid defense. *Dimondale*, 618 N.W.2d at 31-32. The court also noted that 'equity is a shield, not a sword." *Id.* at 32. The district court properly relied on that maxim when it held that a delay of approximately six years in pressing a claim provided sufficient basis to deny Grable relief.

IV

For the reasons set out above, we **AFFIRM** the decision of the district court to deny Grable summary judgment and to award judgment to Darue.

APPENDIX B – ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED AND FILED: APRIL 2, 2001

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:01-CV-37

GABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Plaintiff,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation,

Defendant.

Before Hon. David W. McKeague.

ORDER DENYING MOTION TO REMAND

Plaintiff Grable & Sons Metal Products, Inc., having moved the Court to remand this action to Eaton County Circuit Court, from which it was removed by defendant Darue Engineering & Manufacturing, Inc.; and

The Court having duly considered the motion as well as defendant's response in opposition, and having heard oral arguments on April 2, 2001; and

The Court finding, for the reasons more fully set forth on the record on April 2, 2001, that the plaintiff's complaint does present a question arising under the laws of the United States and

that the Court does, therefore, have subject matter jurisdiction; now therefore,

IT IS HEREBY ORDERED that plaintiff's motion to remand for lack of jurisdiction is **DENIED**.

Dated April 2, 2001

s/ David W. McKeague
Hon. David W. McKeague
United States District Judge

APPENDIX C – OPINION AND JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION
DATED: MARCH 28, 2002
FILED: MARCH 29, 2001

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:01-CV-37

GABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Plaintiff,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation,

Defendant.

Before Hon. David W. McKeague.

OPINION OF THE COURT

This is a quiet title action. Plaintiff Grable & Sons Metal Products, Inc. ("Grable"), commenced the action in Eaton County Circuit Court, asking the court to remove a cloud on its title to certain real property in Eaton Rapids, Michigan. The cloud was created by a quitclaim deed purporting to convey all plaintiff's interest in the subject property from the District Director of Internal Revenue to defendant Darue Engineering & Manufacturing, Inc. ("Darue"), pursuant to a tax sale. Plaintiff alleges the quitclaim deed is void because plaintiff never received proper notice of the Internal Revenue Service seizure of the property in the first place.

Defendant Darue removed the action to this Court, properly contending that adjudication of plaintiff's claim necessarily turns on a proposition of federal law, i.e. the IRS's compliance with the notice requirements of 26 U.S.C. § 6335(a). Subsequently, defendant Darue filed a third-party complaint alleging the United States is liable for Darue's damages if Darue's quitclaim deed is declared void.

The relevant facts are not disputed. Thus, the parties have submitted plaintiff's quiet title claim for judgment as a matter of law based on briefs and oral arguments of counsel. Also before the Court is the United States' motion to dismiss the third-party complaint for lack of subject matter jurisdiction, in that sovereign immunity has not been waived. For the reasons that follow, the Court will award judgment to Darue on plaintiff's quiet title claim, thereby obviating the need for further proceedings on the third-party complaint.

I

It is undisputed that in 1994, the IRS seized the subject Eaton Rapids property, commonly known as 601-701 W. Plains Road, then owned by plaintiff Grable, due to plaintiff's failure to pay corporate income taxes for some six years. It is also undisputed that 26 U.S.C. §6335(a) requires, under the instant circumstances, that notice of the seizure be "given" personally to the owner of the property.[1] Plaintiff

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[1] Section 6335 (a) provides:

(a) **Notice of Seizure**. – As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of

was served of the notice by certified mail. The United States conceded that the conditions prerequisite to authorized service by mail were not met.

Yet, despite undisputedly receiving actual notice of the seizure and subsequent sale of the property on December 13, 1994, and despite its knowledge that the validity of the notice received was questionable, plaintiff took no action to prevent the sale or to redeem the property following the sale to Darue. Darue purchased the property on December 13, 1994 for $44,500. The quitclaim deed was executed on November 13, 1995. Not until December 14, 2000 did plaintiff commence this action challenging the validity of the conveyance.

II

Plaintiff contends that because the procedure attending the IRS seizure of its property was undeniably flawed, the conveyance from the IRS to Darue is void and the quitclaim deed is ineffective to transfer valid title. Plaintiff's claim finds support in the case law. In *Village of Dimondale v. Grable*, 240 N.W.2d 553 (2000), the Michigan Court of Appeals addressed a nearly identical issue concerning other property of Grable & Sons Metal Products, Inc. The court concluded that notice of seizure by certified mail was not in strict compliance with the requirements of 26 U.S.C. § 6335(a). *Id.* at 567-69. Absent strict compliance, the IRS was held not to have perfected its right to sell clear title. *Id.* Consequently, the ensuing tax sale of the land was deemed void and the tax deed was held to be invalid. *See also Goodwin v. United States*, 935 F.2d 1061, 1065 (9th Cir. 1991) (requiring strict compliance with § 6335 notice requirements); *Kulawy v. United States*, 917 F.2d 729, 734-35 (2nd Cir. 1990) (same); *Reece v. Scoggins*, 506 F.2d 967, 970-71 (5th Cir. 1975) (same); *Aqua Bar Lounge, Inc.*, 438 F.Supp. 655, 558 (E.D. Pa. 1977) (same).

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personal property, a description with reasonable certainty of the property seized.

However, there is also case law support for the proposition that substantial compliance with the § 6335(a) notice requirements is sufficient to validate the subsequent tax sale. The § 6335 notice requirements are designed to protect the taxpayer by giving him an opportunity to be present at the tax sale and bid on the property. *Reece*, 506 F.2d at 971. In *Kabakjian v. United States*, 267 F.3d 208 (3rd Cir. 2001), the court held the § 6335 notice requirements must be viewed in light of 26 U.S.C. § 6339(b)(2):

> Under 26 U.S.C. § 6339(b)(2), where a deed to real property conveys property seized under § 6335, such a deed operate as a conveyance of all the delinquent taxpayer's right, title and interest in the property so long as the proceedings "have been substantially in accordance with the provisions of law."

Id. at 213. Thus, notwithstanding a failure to strictly comply with § 6335 – in that the delinquent taxpayers received actual notice of seizure and sale by certified mail, rather than personal delivery – the validity of the ensuing sale was upheld. In the absence of any showing of prejudice, the court held that the Kabakjian's undisputed actual notice of the seizure and sale demonstrated substantial compliance with § 6335, sufficient to transfer title. *See also Kaggen v. Internal Revenue Service*, 71 F.3d 1018, 1021 (2nd Cir. 1995) (holding substantial compliance with § 6335(a) to be sufficient).

Plaintiff insists that *Kabakjian* Is wrongly decided, based on "faulty statutory construction." Plaintiff contends that § 6339(b)(2) does not mean what it says it seems to plainly say. Section 6339(b)(2) provides:

> **b) Deed of real property.**--In the case of the sale of real property *pursuant to section 6335* --
>
> . . .
>
> **(2) Deed as conveyance of title.**--If the proceedings of the Secretary as set forth have been

> *substantially in accordance with the provisions of law*, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

"Subsequently in accordance with the provisions of law" refers exclusively, plaintiff contends, to the provisions of state law that govern the execution of the deed resulting from the tax sale.

Plaintiff has cited case law recognizing that state law governs the execution of the deed and federal law governs the tax sale procedure. *See Martin v. United States*, 37 Fed.Cl. 86, 90 (1996); *Fuentes v. United States*, 14 Cl.Ct. 157, 166-67 (1988). Yet, these cases do not suggest that the substantial compliance language of § 6339(b)(2) applies *only* to the requirements of state law, and plaintiff has cited no published opinion that expressly so holds.[2] In fact the substantial compliance language of § 6339(b)(2), referring not to the execution of the deed, but to "the *proceedings* of the Secretary" in connection with the sale of real property pursuant to § 6335, directly contradicts plaintiff's preferred construction.

Accordingly, the Court remains unpersuaded that *Kabakhian* is wrongly decided. Consistent with *Kabakjian*, the Court concludes that § 6339(b)(2) means what it says. Assuming all other pertinent requirements of state and federal law are met, substantial compliance with the notice requirements of § 6335(a) is sufficient to support valid transfer of title through the tax deed. Inasmuch as plaintiff undisputedly received actual notice of the seizure of its Eaton Rapids property by certified mail; was afforded ample opportunity to be present at the tax sale and bid on the property; and has not even argued that it suffered any prejudice as a result of the IRS's failure to personally deliver notice, the Court is satisfied that § 6335(a) was substantially complied with. It

[2] The cases cited by plaintiff in support of strict compliance of the § 6335 notice requirements, supra, at p. 4, do not even mention § 6339(b)(2).

follows, pursuant to § 6339(b)(2), that the tax deed conveying plaintiff's right, title and interest in the property to Darue is valid and effective as against plaintiff's present challenge.

III

This result is consistent with other decisions that have resorted to equitable principles, rather than § 6339(b)(2), to avoid unjust results that would otherwise proceed from strict enforcement of the § 6335 notice requirements. In *Howard v. Adle*, 538 F.Supp. 504, 508 (E.D. Mich. 1982), the court recognized that a quiet ttile action is an equitable action. The court further recognized that under Michigan law, a party aggrieved by a defective tax sale must act promptly and equitably to avoid the sale. *Id.* That the § 6335 notice in *Howard* was technically defective was deemed to render the ensuing sale not void, but voidable. In weighing the equities and upholding the validity of the sale, the court found three circumstances dispositive: (1) the taxpayers received actual written notice of the impending tax sale; (2) the taxpayers understood the significance of the notice and had the opportunity to be present at the sale; and (3) the taxpayers waited until after the redemption period had passed and the tax deed was executed before challenging the validity of the sale. *D.* at 508-09. Thus, because the purpose of the § 6335 notice requirements was satisfied and the taxpayers had delayed unreasonably in enforcing their procedural rights, the court concluded thay were not entitled to relief in equity. *See also VanSkiver v. United States*, 751 F.Supp. 1522, 1525-26 (D. Kan. 1990) (following *Howard*); *Melling v. Mattley*, 10 Neb.App. 745, 754-58, 637 N.W.2d 661, 668-71 (2002) (same).

The instant facts are materially indistinguishable from those in *Howard*. In fact, the instant facts present an even more compelling case for denial of equitable relief. Whereas the Howards waited until five months after the tax sale to enforce thrie procedural rights, plaintiff Grable waited, inexplicably, some six years after the sale before commencing this action. Plaintiff has thus not shown entitlement to the equitable relief it seeks.

The Michigan Court of Appeals decision in *Village of Dimondale v. Grable*, supra, appears to be at odds with this ruling.

A closer reading, however, suggests otherwise. In *Dimondale*, where Grable was the *defendant* in a quiet title action, the court refused to bar Grable's invocation of the notice defect as a defense. *Id.*, 240 Mich.App. at 570. The court implied that if Grable had been seeking equity as the plaintiff, as were the Howards in *Howard v. Adle*, then Grable would have "opened the door" to the defendant's claim that Grable acted inequitably by failing to timely challenge the sale. The court observed that equity is a shield, not a sword. *Id.* .

Here, consistent with this teaching of *Dimondale*, defendant Darue has properly invoked equity as a shield to protect the validity of title it received more than five years ago. Because plaintiff Grable received actual notice of the seizure and sale, was not prejudiced by the technical notice defect, and has not offered any explanation or justification for its lengthy delay in challenging the sale, equity denies plaintiff relief.[3]

IV

For the foregoing reasons, there being no genuine issue of material fact, the Court concludes that defendant Darue is entitled to judgment as matter of law on plaintiff's quiet title claim against it. The tax deed conveying plaintiff Grable's right, title and interest in the subject property to Darue is valid and effective.

This result renders Darue's third-party action against the United States moot. The third-party complaint will therefore be dismissed.

A judgment order consistent with this opinion shall issue forthwith.

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[3] The Court notes that, in each of the cases cited by the plaintiff in support of strict compliance of the § 6335 notice requirements, supra, at p.4, the equities more clearly favored the challenging taxpayer, who challenged the validity of the tax sale either prior to the sale or reasonably promptly thereafter.

Dated March 28, 2002

s/David W. McKeague
DAVID W. McKEAGUE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:01-CV-37

GABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Plaintiff,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation,

Defendant.

Before Hon. David W. McKeague.

JUDGMENT ORDER

In accordance with the Court's written Opinion of even date,

IT IS HEREBY ORDERED that the quiet title claim of plaintiff Grable & Sons Metal Products, Inc, for removal of a cloud upon its title to property commonly known as 601-701 W. Plains Road, in Eaton Rapids, Michigan, is **DENIED**, and **JUDGMENT** is **AWARDED** in favor of defendant Darue Engineering & Manufacturing, Inc. on plaintiff's quiet title claim; and

IT IS FURTHER ORDERED that the third-party complaint of defendant Darue Engineering & Manufacturing, Inc., against the United States of America is **DISMISSED as moot**.

Dated March 28, 2002

s/David W. McKeague
DAVID W. McKEAGUE
United States District Judge

Supreme Court, U.S.
FILED
DEC 1 - 2004
OFFICE OF THE CLERK

(3)

No. 04-603

IN THE

Supreme Court of the United States

GRABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL C. WALTON
Counsel of Record
600 Waters Building
161 Ottawa Avenue, N.W.
Grand Rapids, MI 49503
(616) 235-3500

Counsel for Respondent

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1 THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO DECIDE THIS CASE

A district court has original jurisdiction over civil actions pursuant to, *inter alia,* 28 U.S.C. §§ 1441 and 1331 (2004). This Court has long held that a district court has subject matter jurisdiction over a case if the plaintiff's complaint establishes that plaintiff's right to relief under a state law requires resolution of a substantial question of federal law in dispute between the parties.

In this case, Petitioner affirmatively alleged in its Complaint that Respondent's deed to a particular piece of property was invalid because Petitioner was given improper notice of the property's seizure pursuant to a federal statute, I.R.C. § 6335 (2004).

The question presented is when a plaintiff files a claim under state law but a substantial federal question regarding a federal statute is explicitly pleaded in the plaintiff's complaint and the federal statute must first be analyzed and resolved before any attempt to address plaintiff's claim can be made, does a defendant have the right to remove such a cause of action to district court?

2 SUBSTANTIAL COMPLIANCE WITH I.R.C. § 6335 IS SUFFICIENT WHERE THE TAXPAYER RECEIVED ACTUAL NOTICE.

There is no split in the circuits regarding strict versus substantial compliance under I.R.C. § 6335. I.R.C. § 6335 concerns the Internal Revenue Service's right to seize property from taxpayers who fail to pay their taxes. Courts have held strict compliance is necessary under I.R.C. § 6335 when a taxpayer does not receive any notice of the seizure or attempts to rectify the seizure before the sale of the property to an innocent third party. Courts have also held that substantial compliance is sufficient under I.R.C. § 6335 – and its counterpart, I.R.C. § 6339 (2004) – when actual notice has been received by the taxpayer but the taxpayer fails to assert any rights until after the sale is completed.

The question presented is when a taxpayer receives actual notice of a seizure of property by the United States for its failure to pay taxes but the taxpayer fails to exercise its rights until six years after the property is sold to an innocent third party. did the United States comply with I.R.C. §§ 6335 and 6339?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Darue Engineering & Manufacturing states as follows:

1. All interested parties to this proceeding are identified in the caption.

2. There is no parent or publicly held company owning 10% or more of Darue Engineering & Manufacturing stock.

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APPENDIX 1 – Transcript and Oral Opinion of the United States District Court for the Western District of Michigan, Southern Division, Dated and Filed: April 2, 2001.

APPENDIX 2 – Complaint to Quiet Title (without exhibits), filed in the Circuit Court for the County of Eaton, State of Michigan, Dated and Filed: December 14, 2000.

Pursuant to Rule 15, Respondent is charged with highlighting to this Court any misstatement of fact or law in the Petition for Writ of Certiorari regarding any issues that would be before the Court if certiorari were granted. While it is true that the facts are undisputed in this case, Petitioner – as it has previously done in the lower courts – has omitted key undisputed facts and/or opinions on both issues in its Petition. For the reasons detailed below, Respondent respectfully requests Petitioner's Petition for Writ of Certiorari be denied.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS BELOW

As Petitioner did with its Sixth Circuit filings, Petitioner failed to attach a critical opinion from the United States District Court for the Western District of Michigan, Southern Division, denying Petitioner's Motion for Remand. The Opinion discussed, in detail, well established principles from the Sixth Circuit and the United States Supreme Court regarding the jurisdictional issue in this case. The transcript from the District Court's denial of Petitioner's motion to remand this case on April 2, 2001, is attached and incorporated as Respondent's Appendix 1. Respondent otherwise concurs in Petitioner's Citations of Official and Unofficial reports of the Opinions Below.

STATEMENT OF JURISDICTION

Respondent concurs in Petitioner's Statement of Jurisdiction.

STATUTORY PROVISIONS AT ISSUE

The relevant portions of 28 U.S.C. §§ 1331, 1340, 1346, 1441, 2410 and 26 U.S.C. §§ 6335 and 6339.

STATEMENT OF THE CASE

A. Factual History.

Prior to 1994, Petitioner, Grable & Sons Metal Products, Inc. ("Grable"), failed to pay its corporate taxes to the Internal Revenue Service ("IRS") for at least six years.[1] As a result, the IRS recorded tax liens against Grable's Property. The IRS then attempted to personally serve Grable a notice of seizure on the Property ("Notice of Seizure") because of the tax deficiency.[2] Unable to personally serve Grable, the IRS sent the Notice of Seizure by certified mail. Although Grable fails to mention this pivotal fact in its Petition, Grable has previously admitted to receiving the certified mailing of the Notice of Seizure and, thus, had actual knowledge that the IRS was seizing its Property.[3] Grable also failed to mention that despite receiving actual notice, Grable took no legal action to stop the seizure or subsequent sale.

Thereafter, the IRS personally served Grable a Notice of the Sale of its Property ("Notice of Sale"), advertised the sale in the local newspaper, and posted the Notice of Sale at a local post office, courthouse, and IRS office. Grable, again, failed to take legal action.

On November 22, 1994, the IRS sold the Property in a tax sale to Respondent, Darue Engineering and Manufacturing ("Darue"). Grable, once again, did nothing to redeem the Property. After the sale and after the time for Grable to redeem the Property was complete, the IRS granted all rights, title and interest in the Property to Darue. Next, the IRS filed suit against Grable for the outstanding tax debt that remained after the sale of the Property. As with every other opportunity Grable had to recover the Property or to complain about defective service, however, Grable did nothing. Consequently, the District Court entered a default judgment in favor of the IRS and against Grable reducing the tax liabilities to judgment.

B. Procedural History.

Although the controversy in this case is really between Grable and the IRS, Grable elected to sue Darue to avoid the federal courts. On December 14, 2000—six years after the sale and on the eve of the statute of limitations running (another key fact Grable failed to mention in its Petition)—Grable sought equitable relief in a quiet title

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[1] The Grable family has a long and interesting history with the Federal Government. United States District Court Judge Gordon A. Quist held several hearings to determine whether the IRS could enter and seize property owned by Grable, including the real property at issue in this matter. Judge Quist ultimately determined that the United States could. In an effort to defeat Judge Quist's order, Grable filed a bankruptcy action in the United States Bankruptcy Court for the Western District of Michigan. That matter was dismissed as a bad faith filing by Judge James D. Gregg. The property was seized and sold in 1995. Thereafter, Grable filed three different appeals to the Sixth Circuit regarding issues related to this case. In all instances, the Sixth Circuit affirmed the District Court's denial of Grable's arguments. *See Internal Revenue Service v. Grable & Sons Metal Products, Inc.*, No. 94-2426, 81 F.3d 160 (Table), 1996 WL 140352 (6th Cir. Mar. 27, 1996); *Grable & Sons Metal Products v. Twitchell*, No. 94-2461, 69 F.3d 537 (Table), 1995 WL 631566 (6th Cir. Oct. 26, 1995); *Grable & Sons Metal Products v. U.S.*, No. 94-1989, 59 F.3d 170 (Table), 1995 WL 367099 (6th Cir. Jun. 19, 1995).

[2] During the Rule 16 Scheduling Conference, the Tax Division Attorney stated that an agent went to Grable's home to personally serve him the notice of seizure on his property but was unable to serve Grable. Thereafter, the agent sent the notice by certified mail. There was also considerable testimony in the hearing before Judge Quist on the United States Marshal's attempts to serve Grable with an order for entry to seize assets. The Grables routinely refused to answer the door and even closed a window on one of the Marshal's hands.

[3] During the Rule 16 Scheduling Conference, Grable's attorney also conceded that Grable received the Notice of Seizure via certified mail.

lawsuit against Darue in state court based on I.R.C. § 6335. The Complaint alleged that Grable remained the owner of its Property despite its repeated failure to pay taxes because the IRS did not comply with I.R.C. § 6335.

On January 16, 2001, Darue filed its Notice of Removal of Action to the District Court based on 28 U.S.C. § 1441. Grable responded on January 31, 2001, by filing a Motion to Remand the Case. On February 13, 2001, Darue filed its Response to Grable's Motion to Remand. Thereafter, on April 2, 2001, United States District Judge David W. McKeague conducted a hearing and, after a detailed analysis of Sixth Circuit and United States Supreme Court decisions, the District Court held that it had proper jurisdiction to hear the case because "the question of federal law raised in this complaint, i.e., the application of I.R.C. § 6335(a), is in fact a 'substantial question' of federal law."[4]

On April 13, 2001, Darue interpleaded the United States into the case because the critical issue in determining the case pertained to the actions of the IRS. On March 22, 2002, the final opinion from the District Court dismissing the entire case was entered. The opinion granted Darue summary judgment because the IRS complied with I.R.C. § 6335, and thus, Darue had proper title to the Property. Grable appealed to the Sixth Circuit Court of Appeals, which affirmed the District Court's opinion that the District Court had jurisdiction to hear this case, by ultimately holding that Grable's claim implicated a substantial federal interest, and thus presented a federal question. The Sixth Circuit also affirmed the District Court's opinion that granted Darue summary judgment because I.R.C. § 6335 was complied with by the IRS when seizing Grable's Property.

[4] Transcript of District Court Hearing on Petitioner's Motion to Remand on April 2, 2001, at 17; attached as Respondent's Appendix 1.

FIRST QUESTION PRESENTED: THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION TO DECIDE THIS CASE

This case involves a well-known tax protestor who is attempting to play "cute" with the judicial system in an effort to continue to avoid paying taxes that are long overdue.[5] Grable has gone through great pains to disguise its claim in an attempt to avoid having this case decided by the federal courts. A cursory review of the complaint and controlling case law regarding subject matter jurisdiction, however, reveals that no matter how Grable has masked its Complaint, the sole issue that is in dispute and must be decided in this case turns on two federal statutes.

A. Reasons for Denying Writ

The Petition for Writ of Certiorari should be denied for three reasons. First, the District Court was correct in holding that it had original jurisdiction over this case. Grable's action may be guised under state law, but a substantial federal question concerning I.R.C. §§ 6335 and 6339 is the sole issue that decides this case.

Second, the jurisdiction issue is moot. By the time the final order dismissing the case was entered, which is the order being appealed, the United States was a party in the case. Thus, under 28 U.S.C. § 1346, the District Court also had original subject matter jurisdiction over this case.

Third, the Sixth Circuit was correct in its holding that the District Court had original jurisdiction. The Sixth Circuit relied upon and analyzed well-established principles regarding jurisdiction that have been affirmed by this Court.

[5] Grable owes the United States well over $2 million dollars as a result of its failure to pay delinquent taxes owed. *See* Appendix C.

B. The District Court Was Correct In Holding It Had Original Jurisdiction To Decide This Case.

1. Any State Law Contained in Grable's Complaint Requires the Resolution of a Substantial Question of Federal Law.

A defendant has the right to remove to a federal district court "any civil action brought in a state court of which the district courts of the United States have original jurisdiction."[6] District courts have original jurisdiction under 28 U.S.C. § 1441 over cases "arising under the Constitution, laws, or treatises of the United States."[7] It is well-settled law that a cause of action arises under federal law when a plaintiff's well-pleaded complaint raises issues of federal law.[8] Specifically, even though state law may create a cause of action in a complaint, a case may still "arise under" the laws of the United States if the well-pleaded complaint established that plaintiff's right to relief under the state law required resolution of a substantial question of federal law in dispute between the parties.[9]

In this case, the District Court had original jurisdiction under 28 U.S.C. § 1331. Assuming, *arguendo*, that state law created Grable's cause of action, Grable's case still arose under the laws of the United States because its Complaint established that Grable's right to relief under state law required the resolution of a substantial question of

[6] 28 U.S.C. § 1441(a).

[7] 28 U.S.C. § 1331.

[8] *See City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997) (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 61 (1987)).

[9] *See Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983).

federal law, namely the notice required by I.R.C. § 6335, which was in dispute between the parties. According to this Court's decisions, this is sufficient to establish federal question jurisdiction in a district court.[10]

When looking at Grable's Complaint, particularly paragraphs 10 and 11, the entire foundation of Grable's claim is based on whether the IRS failed to strictly comply with the notice requirements of federal law when the IRS took title to the Property and then conveyed it in a tax sale to Darue. In other words, Petitioner's right and remedy will rise or fall based on an interpretation of federal law, not state law. Specifically, the Complaint states:

> 10. That the claim of the Defendant is invalid because the interest from which it claims, to-wit the Deed, attached as Exhibit 2, was given with improper notice pursuant to 26 USC 6331, et. seq.
>
> That Grable was not served pursuant to said requirements in that it was not given to it or was not left at the usual place of abode or business that existed within the Internal Revenue District where the seizure was made.
>
> 11. That since the tax deed was given pursuant to improper notice as required by 26 USC 6335(a), said transfer and claim through the tax deed is null and void and void ab initio.[11]

[10] *See, e.g., City of Chicago*, 522 U.S. 156; *Franchise Tax Bd.*, 463 U.S. 1; and *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921).

[11] Complaint to Quiet Title, filed in Circuit Court for the County of Eaton, State of Michigan, dated December 14, 2000; Appendix 2.

Thus, the District Court was left with a Complaint that, on its face, required a determination of the construction of federal law to resolve what was framed as a state law question.

In deciding the jurisdictional issue, the District Court acknowledged that Darue bore the burden of establishing jurisdiction and began its analysis with this Court's holding in *Franchise Tax Bd.* The District Court recognized that *Franchise Tax Bd.* gave specific guidance regarding federal court jurisdiction. That guidance provides that an action is deemed to arise under federal law if (1) the federal law created the cause of action or (2) vindication of a state law right necessarily turned on the construction of federal law.[12]

This Court's decision in *City of Chicago* was also examined by the District Court. *City of Chicago* similarly held that a case may arise under the laws of the United States if it requires resolution of a substantial question of federal law even if state law creates the plaintiff's cause of action:

> As we have explained, however, '[e]ven though state law creates [a party's] causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law.' [Plaintiff's] federal constitutional claims, which turn exclusively on federal law, unquestionably fit within this rule.... By raising several claims that arise under federal law, [plaintiff] subjected itself to the possibility that [defendant] would remove the case to the federal courts.[13]

In its Petition, Grable wholly ignores this holding.

The District Court also analyzed Sixth Circuit case law such as *Long v. Bando Manufacturing of America,*[14] which relied on *City of Chicago.* The Sixth Circuit in *Long,* held that a federal court has subject matter jurisdiction "if a substantial federal question of great federal interest is raised by a complaint framed in terms of state law, and if resolution of that federal question is necessary to the resolution of the state-law claim."[15] The Sixth Circuit in *Long* also recognized and interpreted this Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson,*[16] wherein the Court "clearly left open the possibility of federal jurisdiction even in the absence of an express or implied federal cause of action."[17] The District Court ultimately held:

> In this case a legitimate argument can presumably be made as to whether the question of federal law raised in this complaint, i.e., the application of 26 USC section 6335(a) is in fact a "substantial question" of federal law. In this court's considered opinion, the answer to that

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[12] Franchise *Tax Bd.*, 463 U.S. at 8-9 (citing *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916); and *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921)).

[13] *City of Chicago*, 522 U.S. at 164 (citations omitted). *See also Aetna Health v. Davilla*, 124 S.Ct. 2488, 2494 (2004) (citing *Franchise Tax Bd.*, 463 U.S. at 9-10); *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd.*, 463 U.S. at 22).

[14] 201 F.3d 754 (6th Cir. 2000).

[15] *Long*, 201 F.3d at 759 (citing *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804 (1986), and *City of Chicago*, 522 U.S. at 164) (a case may "arise under" the laws of the United States if it requires resolution of a substantial question of federal law even if state law creates the Grable's cause of action)).

[16] 478 U.S. 804 (1986).

[17] *Long*, 201 F.3d at 759 (citing *Merrell Dow*, 478 U.S. at 805).

question has to be in the affirmative. In no other way would purchasers of property from the federal government that was acquired in tax sales have the ability to rely upon the title they received from the Internal Revenue Service if the law required that, every time a dispute between the federal government and a taxpayer arose, the purchaser at tax sale had to defend the title in state court over claims that the Internal Revenue Service had failed to follow federal law, particularly where in most, if not all, such actions there is no reason for the taxpayer to have even been aware at the time of the purchase at the tax sale of compliance or lack of compliance by the Internal Revenue Code of federal law. Accordingly, this court concludes that the Grable's claim does pose a "significant question of federal law."[18]

The District Court thoroughly analyzed and discussed decisions of the Sixth Circuit and the United States Supreme Court during the remand hearing regarding subject matter jurisdiction and its decision is sound.

2. The Jurisdiction Issue In This Case Is Moot.

Grable would like to ignore the fact that the United States was interpled as a party to this case long before the final order dismissing the case was entered. At the time Darue filed its Notice of Removal, Darue informed Grable that the United States would be brought into the case because

[18] Transcript of District Court Hearing on Petitioner's Motion to Remand on April 2, 2001, at 17; attached as Respondent's Appendix 1.

of the accusations in the Complaint. True to its word, on April 13, 2001, Darue interpled the United States into the case. The final opinion in this matter, which is the opinion being appealed, did not occur until March 22, 2002, almost a year after the United States became a party.

While Darue acknowledges that the District Court must have jurisdiction at all times – *see* Section B.1., *supra* – it would be a waste of judicial resources to remand this case to state court at this point because Darue will – once again – interplead the United States and remove the case from state court to District Court under 28 U.S.C. §§ 1346, 1340, and/or 2410. The identical arguments will again be presented before the same District Court and the same result will occur. Grable's Complaint will be dismissed.

The District Court had subject matter jurisdiction over this case pursuant to 28 U.S.C. § 1346(b), which states:

> (b)...the district courts shall have exclusive jurisdiction of civil claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property,...caused by the negligent or wrongful action or omission of any employee of the government by acting within the scope of his office or employment, under circumstances where the United States, if a private person, will be liable to the claimant in accordance with the law of the place where the act or omission occurred.

A case Grable relies upon in its Petition also supports asserting jurisdiction in this case. In *Aqua Bar & Lounge v.*

U.S. Dept. of Treas.,[19] the Court ruled that it had subject matter jurisdiction over a quiet title claim. The Court stated:

> Characterizing its suit as one to quiet title to property on which the United States has a lien, plaintiff asserts that the district court had jurisdiction to hear this action under 28 USC § 1340 in combination with 28 USC § 2410(a)(1). Section 1340 of the Judicial Code grants the federal district courts "original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue." Clearly, a suit which contests the validity of a federal tax lien and sale falls within its terms.[20]

Since the United States became a necessary party to this lawsuit, it makes sense to have a federal court decide whether a federal agency, such as the IRS, complied with a federal statute, I.R.C. § 6335. The Court should be mindful of Grable's ploy. It purposely filed the action in state court and disguised it as a state court action, so Grable could avoid the United States government and the federal courts.

C. The Sixth Circuit Was Correct In Holding The District Court Had Original Jurisdiction.

Grable also attempts to criticize the Sixth Circuit's analysis. The Sixth Circuit's decision, however, is sound.

Contrary to Grable's assertion that the Sixth Circuit relied upon statues that were not relied upon by the District Court or Darue, the Sixth Circuit cited 28 U.S.C. §§ 1441(a), 1331, and 1340 – the very statutes the District Court and

[19] 539 F.2d 935 (3d Cir. 1976).
[20] *Id.* at 937 (citations omitted).

Darue cited. The Sixth Circuit did not rely on 28 U.S.C. § 1340, as alleged by Grable. In fact, after briefly citing § 1340, the Sixth Circuit stated that "Federal courts also have original jurisdiction over claims 'arising under the Constitution, laws, or treatises of the United States.' 28 U.S.C. § 1331."[21] The Court then stated that the "key question is whether Grable's quiet-title action, based as it is on the faulty process in a tax seizure, 'arises under' federal law and thus invokes federal court jurisdiction."[22] The Sixth Circuit clearly chose to rely upon 28 U.S.C. § 1331; not 28 U.S.C. § 1340.

The Sixth Circuit began its analysis by citing to the United States Supreme Court's opinion in *Taylor v. Anderson*,[23] which held that whether a claim presented a federal question "must be determined from what necessarily appears in the plaintiff's statement of his own claim."[24]

Again, contrary to Grable's assertion, the Sixth Circuit's opinion did not eliminate the necessity of proving original jurisdiction of the District Courts in a removal situation. The District Court has original jurisdiction if the case "arises under" federal law. The Sixth Circuit recognized this as the proper battleground and after careful analysis of the following cases, upheld the District Court's opinion that it had original jurisdiction to decide this case:

> The long history of Supreme Court guidance concerning the meaning of 'arising under' the laws of the United States has been synthesized into a three part test. Although formulations differ slightly among the

[21] *Grable & Sons Metal Products v. Darue Engineering & Mfg.*, 377 F.3d 594, 594 (6th Cir. 2004).
[22] *Id.* at 594-95.
[23] 234 U.S. 74 (1914).
[24] *Id.* at 75-76.

circuits, a federal question may arise out of a state law case or controversy if the plaintiff asserts a federal right that 1) involves a substantial question of federal law; 2) is framed in terms of state law; and 3) requires interpretation of federal law to resolve the case. *Long v. Bando Mfg. of America*, 201 F.3d 754, 759 (6th Cir. 2000); *see e.g. Howery v. Allstate Insurance Co.*, 243 F.3d 912, 918 (5th Cir.), *cert. denied*, 534 U.S. 993 (2001); *Seinfeld v. Austin*, 39 F.3d 761, 763 (7th Cir. 1994), *cert. denied sub nom. Abbot Labs v. Seinfeld*, 514 U.S. 1126 (1995). The asserted federal rights in this case, personal notification of seizure of property as provided by IRS regulations, fulfills these three requirements.[25]

Based on the above analysis, the Sixth Circuit acknowledged that Darue had the burden of proof regarding the jurisdictional issue since it previously held that the burden of proof is on the party removing a case to federal court in *Long*, which it cited in its opinion.

Grable cites *Seinfeld v. Austin*,[26] in its Petition to support its position that a district court only has jurisdiction if there is a private cause of action arising out of federal law between the two parties. Such a holding is inconsistent with this Court's previous and long-standing jurisdictional cases.[27] Further, it is questionable whether the Seventh

[25] *Grable & Sons*, 377 F.3d at 595.

[26] 39 F.3d 761, 763 (7th Cir. 1994), *cert. denied sub. nom. Abbot Labs v. Seinfeld*, 514 U.S. 1126 (1995).

[27] *See Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) *Franchise Tax Bd .*, 463 U.S. 1 (1983); and *City of Chicago*, 522 U.S. 156 (1997). Also note, Grable cites this Court's decision in *Wilder v. Virginia Hospital Assn.*, 496 U.S. 498 (1980) as support for its position.

Circuit even intended for *Seinfeld* to apply in this context. As the First Circuit aptly noted in *Templeton Board of Sewer Comm'rs. v. American Tissue Mills of Mass.*, "*Seinfeld* failed to address the discrete class of cases where a substantial federal question may confer jurisdiction under § 1331."[28]

Even assuming, however, that the *Seinfeld* court did address the substantial federal question jurisdictional issue (which is the second category of federal jurisdiction held to exist by *Franchise Tax Bd.* and *City of Chicago*), Grable's argument in its Petition that a federal court lacks jurisdiction unless a plaintiff has a private cause of action created by federal law completely eviscerates *Franchise Tax Bd.'s* second category of federal jurisdiction. If Grable is correct, the second category of federal jurisdiction will effectively collapse into the first category of federal jurisdiction also held to exist by *Franchise Tax Bd.*, which allows federal jurisdiction if a federal law created a state law action. In essence, there would be only one test for federal jurisdiction, not two. Such an argument, however, is against the great weight and history of Supreme Court doctrine on this issue. Specifically, Grable's argument is simply irreconcilable with this Court's longstanding principle of *Smith*, *Franchise Tax Bd*, and *City of Chicago* which hold that there are two ways a state claim can "arise under" federal law: (1) federal law creates the state claim: or (2) vindication of a state law right necessarily turned on the construction of federal law.

The position taken by the Seventh Circuit in *Seinfeld*, and by the Petitioners in this case, draws the line for "arising under" jurisdiction in these cases – state law cases which necessarily turn on construction of federal law – at the

Although not expressly overruled, *Wilder* has been so restricted by subsequent holdings of the Supreme Court and approximately 40 other federal courts that its continued precedential viability is suspect.

[28] 352 F.3d. 33, 39 (1st Cir. 2003).

question of whether the federal law in issue creates a private right of action. This Court, however, has drawn that line at the question of whether the federal question is "substantial," not at the question of whether it creates a private right of action. In that this Court has not overruled its longstanding doctrinal rule of *Smith* and *Franchise Tax Bd.*, Grable's attempt to redraw the line is simply unsupportable.

Finally, if the Court were to reverse the Sixth Circuit's decision and, in so doing overrule the longstanding principles of *Smith* and *Franchise Tax Bd.*, the consequence would be that an entire class of cases, which logic and reason dictate do "arise under" federal law would be excluded from federal court jurisdiction. A clever plaintiff could exploit this and avoid federal court by couching what is clearly a federal question in state law terms.

Perhaps seeing the inherent weakness in its argument, Grable next attempts to argue that *Franchise Tax Bd.*'s and the Sixth Circuit's decisions are inconsistent. *Franchise Tax Bd.* held that the "arising under" jurisdiction will be appropriate when the only question in the case is an interpretation of federal law and the federal question is "substantial."[29] The Sixth Circuit accounted for this in its holding by incorporating the "substantial question of federal law" element into its three-part test.

Regarding the two lower court cases cited by Grable in its Petition for the proposition a plaintiff may have a federal right but have that right be unenforceable in federal court, Grable misinterprets the cases it cites. In *Little River Farms v. U.S.*, the federal court held that it had jurisdiction to hear the case and stated that the taxpayer had a right under one federal statute and a remedy for enforcing that right

[29] *Franchise Tax Bd.*, 463 U.S. at 13. *See also City of Chicago*, 522 U.S. at 164.

under another federal statute.[30] Regarding *Popp v. Eberlein*, the Seventh Circuit ultimately agreed that the lower district court had jurisdiction to hear and decide the case even though a state court could also decide the case.[31] This is consistent with the District Court's reasoning in this case. Judge McKeague reasoned:

> I don't think there is any doubt that, absent a removal petition, that the state courts could make this determination. Lots of things are matters of concurrent jurisdiction between the state and federal court system. . . so I don't think we have to spend a lot of time arguing about that.[32]

Grable attempts to deflect the District Court's and Sixth Circuit's sound reasoning and holding with inapplicable and doctrinally inconsistent case law. Grable would like to characterize this case as a typical quiet title action. This case, however, is unlike a traditional quiet title action and has an abundance of unique facts. This case arises under federal law of the United States because Grable's claim will be substantiated if I.R.C. §§ 6335 and 6339 are given one construction and it will fail if it is given another construction. State law is not, under any stretch of the imagination, the basis of this claim.

[30] 328 F.Supp. 476 (N.D.Ga. 1971).

[31] 409 F.2d 309 (7th Cir. 1969), *cert. denied*, 396 U.S. 909 (1969).

[32] Transcript of District Court Hearing on Petitioner's Motion to Remand on April 2, 2001, at 6; attached as Respondent's Appendix 1.

SECOND QUESTION PRESENTED: SUBSTANTIAL COMPLIANCE WITH I.R.C. § 6335 IS SUFFICIENT WHERE THE TAXPAYER RECEIVED ACTUAL NOTICE

A. Reason for Denying the Writ

The Petition for Writ of Certiorari should be denied because case law regarding the interpretation of I.R.C. §§ 6335 and 6339 is clear. Strict compliance is required when only I.R.C. § 6335 is involved and substantial compliance is required when I.R.C. § 6339 or equitable concerns become involved. There are no splits in the circuit regarding I.R.C. § 6335. The undisputed facts Grable fails to mention in its Petition distinguish this case from all the cases Grable cites.

B. The District Court and Sixth Circuit Were Correct in Dismissing Grable's Case As a Matter of Law Because There Was No Genuine Issue of Material Fact that the United States Complied with I.R.C. § 6335 When Grable Received Actual Notice That the United States Was Seizing Its Property.

In its Petition, Grable relies upon case law that is factually inapposite to this case. As discussed in more detail below, the cases Grable cites are premised upon either a taxpayer failing to receive notice prior to the IRS seizing and selling the taxpayer's property or the taxpayer suing the IRS prior to the IRS selling the property. In these factual situations, strict compliance with I.R.C. § 6335 is required because the purpose of the notice requirement has either not been met or the taxpayer has promptly attempted to redeem his or her property before the procedures of I.R.C. § 6339 and an innocent third party becomes involved.

This case, however, is very different. In this case, Grable received actual notice—both by certified mail and personal service—prior to the IRS seizing and selling Grable's property and Grable failed to legally redeem its property. Because of Grable's silence, the IRS sold Grable's property to Darue. Six years later Grable sued Darue seeking an equitable remedy to quiet title on its property. Since a tax sale of Grable's property was completed before Grable initiated this action, the less stringent "substantial compliance" rule of I.R.C. § 6339 applies to the case. Further, like the numerous cases cited below, in situations like this, because the statutory purpose – actual notice – has been accomplished and Grable failed to promptly act upon receiving such notice, Grable is barred from coming into court seeking equitable relief.

1. Actual Notice is Sufficient to Validate a Tax Sale.

Federal courts have held that where the taxpayer receives actual notice prior to the sale, fails to act upon that notice, and then attempts to come into court and seek equitable relief, that taxpayer's claim fails based on I.R.C. §§ 6335 and 6339. *Kaggen v. IRS*, 71 F.3d 1018 (2nd Cir. 1995) (holding that where a taxpayer receives actual notice of his seizure of property, although not in the specified manner, the requirements of I.R.C. § 6335(a) have been fulfilled); *Vote v. U.S.*, No. 90-16116, 930 F.2d 31 (Table), 1991 WL 54876 (9th Cir. Apr. 12, 1991), *aff'd*, No. 93-15774, 26 F.3d 135 (Table), 1994 WL 245835 (9th Cir. Jun. 7, 1994) (recognizing the Second Circuit has required strict compliance with the notice requirement but distinguishing those cases where the delinquent taxpayer received actual prior notice of the sale and failed to act); *McCoy v. U.S.*, Civ. A. No. CA 5-91-273-C, 1992 WL 210090 (N.D.Tex. Jul. 17, 1992) (refusing to void sale of ranch where plaintiff received

actual prior notice of seizure and sale by certified mail);[33] *Van Skiver v. U.S.*, 751 F.Supp. 1522 (D.Kan. 1990) (holding that plaintiffs cannot invalidate the sale of their property for the IRS's failure to personally serve notice of sale where they received actual notice by certified mail a week prior to the sale and failed to act during the 180-day redemption period); *Olson v. U.S.*, CIV. No. 88-763, 1990 WL 132474 (W.D.Pa. Jul. 5, 1990) (since actual notice is the reason for the hand-delivery requirement of I.R.C. § 6335, we hold that plaintiff cannot defeat the motion for summary judgment due to the IRS's technical failure when they received actual notice); and *Arch Flying Association v. U.S.*, No. 96-0663-CV-W-5, 1997 WL 873544 (W.D.Mo. Dec. 11, 1997) (stating that a failure to strictly comply with the notice provisions of I.R.C. § 6335(a) does not invalidate a sale when the taxpayer received actual notice of the sale.)

The Third Circuit has also held that notice by certified mail complied with the requirements of I.R.C. § 6335.[34] On facts practically identical to the present case, the taxpayers in *Kabakjian* claimed the United States did not comply with I.R.C. § 6335 because it sent the notice of seizure by certified mail instead of hand delivery. The taxpayers received actual notice of the seizure, however, by the certified mailing. The United States subsequently sold the taxpayer's property to a third party. The Third Circuit held that such notice complied with §§ 6335 and 6339.[35]

The Third Circuit reasoned that the purpose of the notice provisions was met when the taxpayer received actual

[33] The court in *McCoy*, sitting in the Fifth Circuit, clearly did not read the "strict compliance" language in *Reece v. Scoggins*, 506 F.2d 967 (5th Cir. 1975) – a case Grable has cited to support its position – to preclude consideration of equitable factors. *See also Kabakjian v. U.S.*, 92 F.Supp.2d 435 (E.D.Pa. 2000), *aff'd*, 267 F.3d 208 (3d Cir. 2001).

[34] *Kabakjian v. U.S.*, 267 F.3d 208, 213 (3d Cir. 2001).

[35] *Id.* at 213.

notice.[36] The court further ruled that the holding was consistent with I.R.C. § 6339(b)(2).[37] I.R.C. § 6339(b)(2) provides title transfer from the United States to a third party if there has been *substantial compliance* with the notice and other procedures set out in I.R.C. § 6335.[38] The Court rationalized the two statues by ruling that, because the taxpayers received actual notice under I.R.C. § 6335 and the taxpayers failed to show that they were meaningfully prejudiced by receipt of the I.R.C. § 6335 notices by certified mail instead of personal delivery, the United States complied with I.R.C. §§ 6335 and 6339.[39] In fact, the district court in *Kabakjian* stated that it would be a "rare case . . . in which a taxpayer who did timely receive actual notice can establish damages as a proximate result of the failure to strictly comply with the prescribed mode of service" under I.R.C. § 6335.[40]

The *Kabakjian* court went on to hold that I.R.C. § 6339(b)(2) indicates that title is conveyed if the sale is "substantially in accordance with the provisions of the law" and the IRS's notice of seizure and sale by certified mail, while not in literal compliance with I.R.C. § 6335, did provide the taxpayers with actual notice, thus providing substantial compliance.[41]

Howard v. Adle,[42] is a Michigan District Court case that is also factually identical to the present case. In *Howard*, the IRS mailed—instead of personally serving—plaintiffs a notice that their property would be seized and

[36] *Id.* at 213.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Kabakjian v. U.S.*, 92 F.Supp.2d 435, 442 *aff'd.* 267 F.3d 208 (3d. Cir. 2001).

[41] *Kabakjian supra* at *3 (E.D.Pa. Dec. 22, 1998).

[42] 538 F. Supp. 504 (E.D. Mich. 1982).

sold because of delinquent taxes. Plaintiffs received the notice. Despite having actual notice prior to the sale, plaintiffs failed to pay their taxes or redeem the property during the redemption period. It was only after defendant purchased the property, that plaintiffs sued defendant, in equity, to quiet title on the theory that the IRS failed to comply with the notice requirement of I.R.C. § 6335.

The plaintiffs in *Howard*, like Grable, argued that, although they received actual notice through the mail, the tax sale was void because the IRS failed to personally serve them the notice as required under I.R.C. § 6335. The plaintiffs cited numerous cases in other circuits to support their argument that strict compliance is required under I.R.C. § 6335 for a tax sale to be valid (ironically, some of the same cases the plaintiffs relied upon in *Howard* have been relied on by Grable). The defendant in *Howard* admitted that the IRS did not strictly comply with the requirements of I.R.C. § 6335, but argued that, because the delinquent taxpayers received actual notice prior to the sale and failed to act promptly to redeem their property, they were now estopped from seeking any equitable remedy. The Court agreed with the defendant and dismissed plaintiffs' quiet title action.[43]

The *Howard* court's analysis did not end with I.R.C. § 6335.[44] The court reasoned that, because plaintiffs sought equitable relief, they must also show that they themselves have done equity.[45] The Court stated the general rule in Michigan: "where. . . a serious defect occurs in the tax sale, it may be attacked by the owner of the premises, *provided he*

[43] *Id.* at 509.
[44] *Id.* at 508.
[45] *Id.* at 508 (citing *McAndrews v. Belknap*, 141 F. 2d 111, 115 (6th Cir. 1944)).

acts promptly and does equity."[46] The court went on to reason that plaintiffs' failure to notify the IRS or defendant during the redemption period and their attempt to redeem the property only at the last minute through a lawsuit estopped them from pursuing their claim in equity.[47]

The court in *Howard* also distinguished plaintiffs' cited cases regarding literal compliance as necessary under I.R.C. § 6335 on two grounds. First, the plaintiffs' cases simply found that non-compliance with the notice requirements rendered the sale voidable without considering whether or not the taxpayer was even entitled to equitable relief under state law. Second, none of the taxpayers in those cases received actual notice prior to the sale.[48] In *Howard*, however, there was no dispute that plaintiffs received actual notice. Thus, the purpose of the statutory notice requirements – to allow the taxpayer an opportunity to be present at the tax sale and bid on the property – was met.[49] As a result, the rules of equity prevented plaintiffs from recovering their property.

The present case is factually indistinguishable from the *Howard* case. There is no dispute that Grable received actual notice that the IRS was seizing its property. Like the plaintiffs in *Howard*, despite receiving actual notice, Grable failed to buy the Property at the sale, or redeem the Property after it was sold. Additionally, Grable failed to argue strict compliance of I.R.C. § 6335 – or argue anything for that matter – when the IRS sued Grable. Instead, six years after the sale, Grable sued Darue in equity seeking to quiet title.

[46] *Id.* (emphasis added) (quoting *Detroit Trust Co. v. Lieberwitz*, 275 Mich. 429, 436 (1936)). *See also Blondin v. Griffin*, 133 Mich. 647, 95 N.W. 739 (1903).
[47] *Id.* at 508.
[48] *Id.* at 509.
[49] *Id.*

As explained in *Howard*, in order to recover in equity, Grable must have done equity. Grable failed to do so.

In the *Village of Dimondale v. Grable,*[50] – a previous case regarding Grable – the Village sued Grable to quiet title to real property. The Village argued that Grable's inequitable delay in acting on his rights to redeem the property barred his claim to the property. The Court held that because Grable *was the defendant* in the case and did not initiate the equitable action to quiet title, the equitable argument was unpersuasive.[51] The Court, however, went on to claim that if the taxpayer *was the plaintiff* who brought a lawsuit to quiet title, he would be opening the door to the claim that he failed to act in equity and thus, could not recover.[52] The court observed the equity is a shield, not a sword.[53] Here, Darue has properly invoked equity as a shield to protect the validity of title it received so many years ago. According to Grable's own previous case, Grable's quiet title action must fail.[54]

Grable is now the plaintiff suing in equity and has failed to act with reasonable promptness to redeem the Property. Thus, Grable should be estopped from receiving equitable relief when, in fact, Grable has not done equity itself. Notice requirements under I.R.C. § 6335 are designed to protect the taxpayer by giving him "an opportunity to be present at the tax sale and bid on the property."[55] Notice provisions also allow the taxpayer to protect his interest in

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[50] 240 Mich. App. 553, 618 N.W. 2d 23 (2000).

[51] *Id.* at 569-70, 618 N.W.2d at 31.

[52] *Id.* at 570, 618 N.W.2d at 31-32.

[53] *Id.*

[54] The rule of equity that bars Grable's claims has been established in Michigan law for almost one hundred years. *See Blondin v. Griffin,* 133 Mich. 647, 648; 95 N.W. 739, 739 (1903).

[55] *Howard,* 538 F. Supp. at 509 (quoting *Reece v. Scroggins,* 506 F.2d 967 (5th Cir. 1975)).

the property and provide him with adequate due process.[56] Grable had every opportunity to protect its purported interest and chose not to do so.

2. The Cases Grable Cites Are Inapplicable.

Significant factual dissimilarities between the cases Grable cites in its Petition to support its I.R.C. § 6335 strict compliance argument and this case are evident. Grable relies on *Reece v. Scoggins*[57] and *Aqua Bar & Lounge, Inc. v. U.S. Dept. of Treas.*[58] for the principle that a tax sale should be rendered void when the IRS fails to comply with the notice requirements of I.R.C. § 6335.

Reece and *Aqua Bar* are distinguishable from this case for at least two reasons. First, neither *Reece* nor *Aqua Bar* considered whether the taxpayer was entitled to equitable relief as a plaintiff.[59] Second, in *Reece* and *Aqua Bar* there was a dispute whether the taxpayer received actual prior notice of the sale and seizure of the taxpayer's property.[60] Thus, "there was a substantial issue whether the taxpayer had been given 'an opportunity to be present at the tax sale and bid on the property', the central purpose of the statutory notice requirements."[61]

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[56] *Verba v. Ohio Casualty Ins. Co.,* 851 F.2d 811, 816 (6th Cir. 1988).

[57] 506 F.2d 967 (5th Cir. 1975).

[58] 438 F. Supp. 655 (E.D. Pa. 1977).

[59] *Howard,* 538 F.Supp. at 508-09.

[60] *Id.*

[61] *Id.* (*Reese and Aqua Bar* were also considered and found inapplicable by the federal court in *Howard*). *See also Kabakjian v. U.S.,* 92 F.Supp.2d 435 (E.D.Pa. 2000), *aff'd,* 267 F.3d 208 (3d Cir. 2001) (distinguishing the taxpayer's case law supporting the position that strict compliance is necessary under I.R.C. § 6335, of which one case was *Reece*).

In this case, unlike *Reece* and *Aqua Bar*, Grable received actual prior notice of the seizure of its property. In fact, Grable also received–via personal service–notice of the sale of its property. There is absolutely no dispute that Grable received prior written notice of both the seizure and sale of its property and that it had the opportunity to be present and bid at the tax sale. Grable's reliance on *Reece* and *Aqua Par* is an attempt to gloss over the equitable hurdles it must overcome. As reasoned by the District Court in *Howard*, this Court must decide whether Grable is entitled to equitable relief before it can render the IRS's sale of Grable's property to Darue void. Grable misconstrues the equitable argument for obvious reasons; it knows it will fail. Grable's reliance on *Reece* and *Aqua Bar* simply does not support its argument for strict interpretation of I.R.C. § 6335.

Grable also cites *Goodwin v. U.S.*,[62] for the strict compliance approach to I.R.C. § 6335. This case too, has been distinguished by a subsequent case cited earlier in this Brief. In *Kabakjian*,[63] – a case where the taxpayer received notice by certified mail, failed to take any legal action, and as a result, the IRS sold the property to a third party – the taxpayer claimed that the IRS did not comply with I.R.C. § 6335 because the taxpayer was not personally served with the notice of seizure. The taxpayer in that case cited *Goodwin* for the proposition that personal service of the notice of seizure was required for the IRS's tax sale of the taxpayer's property to be valid. In distinguishing *Goodwin*, the *Kabakjian* court noted – as does Darue – that the property at issue in *Goodwin* had not been sold to a third party at the time the legal action was taken. The plaintiff in *Goodwin* actually sought to stop the sale because of the IRS's failure to comply with I.R.C. § 6335 and thus, I.R.C.

[62] 935 F.2d 1061 (9th Cir. 1991).

[63] *Kabakjian v. U.S.*, No. Civ.A. 97-5906, 1998 WL 962124, at *3 (E.D.Pa. Dec. 22, 1998).

§ 6339 and an innocent third-party purchaser were not involved in *Goodwin* like they were involved in *Kabakjian*, and are involved here. Therefore, Grable's analysis of *Goodwin* is incomplete and inapplicable.

Kulawy v. U.S.,[64] is another case Grable cites for its position that strict compliance with I.R.C. § 6335 is required. Again, unlike Grable, the taxpayer in *Kulawy* attempted to redeem his personal property *before* the IRS sold the property to a third party. Thus, any reliance on *Kulawy* is misplaced because it did not take into consideration I.R.C. § 6339 or any of the equitable arguments present in this case. Moreover, *Kulawy* dealt with a provision of I.R.C. § 6335(d) that is not relevant to this case.

Grable also uses *Powelson v. U.S.*,[65] as another example that I.R.C. § 6335 must be strictly followed. This case is also inapplicable. In *Powelson*, the IRS argued that it complied with I.R.C. § 6335 by mailing the taxpayer the notice because the taxpayer could not be readily located. This is not what Darue is arguing in this case. Darue is arguing that Grable received actual prior notice of the IRS seizure and sale of its property. Despite receiving such notice, Grable repeatedly failed to recover the property or pursue any legal action to get the property back until six years after the property was sold to Darue. At that time, Grable initiated a lawsuit against Darue seeking an equitable remedy: to quiet title. It is because Grable is attempting to recover in equity when Grable sat on its rights and has done no equity itself for the last six years that Darue is arguing that this case does not end with an analysis of I.R.C. § 6335. Equitable factors are involved. And because the IRS already sold the property to Darue, I.R.C. § 6339 becomes relevant in determining the correct outcome of this case.

[64] 917 F.2d 729 (2nd Cir. 1990).

[65] 979 F.2d 141 (9th Cir. 1992), *cert. denied*, 507 U.S. 1029 (1993).

Although Grable asserts in its Petition that "even the Sixth Circuit was previously in line with the need for the IRS to strictly comply with the notice requirements of I.R.C. § 6335(a)," Grable misapplies the two Sixth Circuit cases it cites. While *Verba v. Ohio Casualty Ins. Co.*[66] addresses I.R.C. § 6335, it only stated that more than constructive notice is required. Additionally, Grable cited *McAndrews v. Belknap*.[67] The court in *McAndrews* held that if a plaintiff seeks equitable relief, it must also show that they themselves have done equity.[68] It is clear that Grable has shown no equity or prejudice in this case.

Grable also attempts to cite certain United States Supreme Court decisions to support it argument that courts cannot resort to equity to justify a violation of the law. Obviously, that is not what this case is about nor is it what either the District Court or Sixth Circuit held. This case's unique facts simply put this case squarely into the unambiguous language and control of I.R.C. § 6339. It is this section, not solely equity principles, that supports the District Court and Sixth's Circuit's decision that the United States complied with the Internal Revenue Code when it provided Grable with actual notice of its seizure of Grable's property.

3. I.R.C. § 6335, When Read With I.R.C. § 6339, States That Substantial Compliance is Sufficient to Validate a Tax Sale.

Because the United States already sold the Property, this case cannot be decided without also considering and interpreting I.R.C. § 6339. Under I.R.C. § 6339, "In the case

[66] 851 F.2d 811 (6th Cir. 1988).
[67] 141 F.2d 111 (6th Cir. 1944), *cert. denied*, 323 U.S. 721 (1944).
[68] *Id.* at 115.

of sale of real property pursuant to I.R.C. § 6335. * * * If the proceedings have been *substantially in accordance* with the provisions of law. . . ." all rights a delinquent taxpayer has in the real property is conveyed to the purchaser from the United States. Thus, the "proceedings" are the seizure and sale of property and the "provisions of law" with which the IRS must be "substantially in accordance" are those contained in I.R.C. § 6335.

Cases that discuss I.R.C. § 6335 rarely discuss I.R.C. § 6339 because a taxpayer that is legitimately and equitably asserting its rights will file suit before the IRS sells the property to a third party. However, when that sale is completed, courts cannot interpret I.R.C. § 6335 without also interpreting I.R.C. § 6339. Once the property is sold, those statutes recognize that the process has progressed so far that it will not be voided if there has been "substantial compliance." In finding that I.R.C. § 6339 only requires substantial compliance with the notice requirement of I.R.C. § 6335, the district court in *Kabakjian* stated:

> Interestingly, virtually none of the courts stating that strict compliance with I.R.C. § 6335 is required addressed the import of § 6339(b)(2) which provides that all interest in and title to the delinquent property are effectively conveyed if the IRS proceeds in a manner 'substantially in accordance with the provisions of law.'[69]

Here, because Grable's Property was sold to Darue, I.R.C. § 6335 cannot be read in isolation. Grable received actual notice prior to the seizure and sale of the Property and failed to redeem the Property or raise a claim. Thus, the

[69] *Kabakjian v. U.S.*, No. Civ.A. 97-5906, 1998 WL 962124, at *3 (E.D.Pa. Dec. 22, 1998).

United States sold the Property to Darue. Once the sale was complete, I.R.C. § 6339 controlled the reading of I.R.C. § 6335 and only substantial compliance was necessary. Grable is not merely attempting to invalidate the IRS's seizure, it is attempting to deprive Darue of property it purchased six years ago. The sale was valid under I.R.C. § 6339.

Grable wants to begin and end the analysis of this case with strict compliance regarding I.R.C. § 6335. If Grable had acted promptly, it perhaps could have. Because of Grable's unreasonable delay, this case cannot begin and end with I.R.C. § 6335. This case is decided upon the language of I.R.C. §§ 6335 and 6339. Once Grable's Property was sold and Darue became involved, the less stringent requirement of "substantial compliance" controls. Therefore, the District Court's and Sixth Circuit's dismissal of Grable's claims as a matter of law was proper.

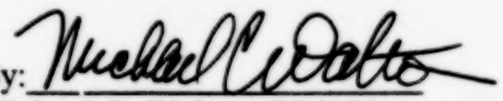
CONCLUSION

For the reasons articulated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RHOADES MCKEE
Attorneys for Respondent

Dated: November 29, 2004

By: 

Michael C. Walton (P26121)
Business Address:
161 Ottawa Avenue, NW,
Suite 600
Grand Rapids, MI 49503
616-235-3500

APPENDIX

APPENDIX 1

TRANSCRIPT AND ORAL OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, DATED AND FILED: APRIL 2, 2001

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GRABLE & SONS METAL PRODUCTS, INC.,
a Michigan corporation,

Plaintiff,

vs. No. 1:01-CV-37

DARUE ENGINEERING & MANUFACTURING,
INC., a Michigan corporation,

Defendant.
_____/

MOTION TO REMAND
BEFORE THE HONORABLE DAVID W. McKEAGUE
UNITED STATES DISTRICT JUDGE
Lansing, Michigan, April 2, 2001, at about 1:35 P.M.

APPEARANCES:

J. Thomas Schaeffer
206 South Kalamazoo
Marshall, MI 49068
On behalf of the Plaintiff;

Michael C. Walton
Rhoades, McKee, Boer, Goodrich &Titta
161 Ottawa Avenue, N. W., Suite 600
Grand Rapids, MI 49503
On behalf of the Defendant.

Court Reporter: Sharon E. Fox. CSR-3342
315 West Allegan Avenue
Lansing, MI 48933
(517) 484-8083

Lansing, Michigan

April 2, 2001, 1:35 P.M.

(Call to order of the court.)

THE COURT: Please be seated. Sorry for the brief delay.

This is the matter of Grable & Sons Metal Products, Inc., versus Darue Engineering & Manufacturing, Inc.

Appearing on behalf of the plaintiff is Mr. Schaeffer. Appearing on behalf of the defendant is Mr. Walton.

This is the time set for a hearing on the plaintiff's motion to remand this case to the Circuit Court for the County of Eaton from which it was removed.

The court has reviewed the motion and the response and reply.

Mr. Schaeffer, this is your motion, so you may proceed.

MR. SCHAEFFER: Thank you, Your Honor. May it please the court. As set forth in our motion and memorandum, it is the plaintiff's position that the action brought in Eaton County was to quiet title and that the case law as set forth in the memorandum indicates that a quiet title action is a state court action and not a federal court action. The memorandum goes through and discusses some of the concerns that defendant had in its position of asking that this be removed to the federal court, and I don't think they have merit.

The courts have indicated on a quiet title that the state courts have the ability to interpret and implement federal law if, in fact, it's a quiet title action, and that's all that this is. It's one party against another party, it's not against the government, and the determination has to be made in state court along the state court rules and law as to whether or not title should be quieted in behalf of plaintiff as pled.

THE COURT: I agree with you that in general a quiet title action is traditionally viewed as a state court action. There is no diversity here, so we're looking at whether there is a federal question that's presented on the face of the complaint.

As you know, under federal law the action is deemed to arise under federal law if a federal law created the cause of action, which is not true here, or, and this is the more important part, where vindication of a state law right, which would be the traditional quiet title action, necessarily turns on some construction of federal law. That's what Franchise Tax Board versus Construction Laborers tells us. Now, while there is no question that there are a number of cases where these type of actions have been maintained in federal court, as Mr. Walton has indicated, they don't seem particularly persuasive to me because there really isn't any analysis of

what I believe to be the essential underlying legal question in those cases. They simply sort of assume that it turns on the construction of some federal law.

What it seems to me the question is here is whether under the unique facts of this case, if this matter was heard in the Eaton County Circuit Court as a traditional state quiet title action, would the case turn on some construction of federal law? Now, the reason why that seems to me to become particularly important under the facts of this case is that when you look at your complaint, particularly paragraphs 10 and 11, it appears as if the entire basis of the claim by Grable that Darue's deed is void is that the IRS that, as I understand it, took title to this property, I assume because of failure to pay taxes, and then conveyed it in a tax sale to Darue, whether they had failed to strictly comply with the notice requirements of federal law. If I'm right about that, does not the underlying question that the state court would be asked to resolve if I remanded this back turn on the proper construction of federal law, in other words, whether the IRS was required to proceed in one way versus another way and the manner in which they gave notice to the corporation that they were taking title to this property?

MR. SCHAEFFER: I think that it turns on state law as to whether or not there was proper transfer of title to Darue, and obviously that has to do with the procedures that the IRS did or did not go through at the time of their actions.

THE COURT: Are the procedures that you contend the IRS was required to go through and failed to go through matters of state law or matters of federal law? They're matters of federal law, are they not?

MR. SCHAEFFER: Well, the underlying part is federal law as to whether or not they followed 6335(a) in relation to the notice of seizure, but I think it's state law as to

whether or not this ownership or claim of title by Darue or the transfer to the IRS to Darue was void ab initio in relation to what they transferred or what Darue purchased at the time that they purchased it.

THE COURT: But is it void ab initio, as you say it, as a matter of state law because state law was violated or is it void ab initio under state law because the IRS violated or failed to follow the procedural requirements of federal law?

MR. SCHAEFFER: In all due respect, I think we've got a chicken-and-egg argument here, but I think it's the violation of the state law based on the nonapplication or proper application of the federal law.

THE COURT: Well, let's assume for purposes of our discussion that in violating the federal law, if that in fact is what happened here, there then was -- the result was an absence of an ability to vest valid title under state law, and that's essentially what you are saying, are you not?

MR. SCHAEFFER: Yes.

THE COURT: Now, wouldn't either this court or the state court, whoever ends up hearing this, still have to make a determination of what the Internal Revenue Code requires by virtue of the notice requirement provisions of the Internal Revenue Code?

MR. SCHAEFFER: I think it does, but it has to make that determination, I submit, Your Honor, in applying the federal law to that particular issue, and the cases many of the cases cited have indicated that the state law has been upheld in having that ability to do so.

THE COURT: I don't think there is any doubt that, absent a removal petition, that the state courts could make

this determination. Lots of things are matters of concurrent jurisdiction between the state and the federal court system, and the state courts are deemed to be equally competent in almost all areas to make determinations under federal law, so I don't think we have to spend a lot of time arguing about that.

The question really becomes who gets to determine the forum? Does the plaintiff get to determine the forum by filing in state court or does the defendant -- well, let me say it another way. It would appear, if this case does turn on a construction of federal law, that arguably the plaintiff, when in this case the corporation is the master of their own complaint, could make the decision as to whether they wanted to go to federal court or they wanted to go to state court. Here the decision was to go to state court.

The question then becomes whether the defendant also has the ability to choose the forum in this case by addressing the question of whether on the face of the complaint there is an allegation of a violation of federal law or whether on the face of the complaint, in order to resolve the state law question, there has to be a determination of the construction of federal law, because if that's true, even though the state law -- even though the state court would presumably be equally competent to interpret the Internal Revenue Code, that doesn't end the inquiry because the defendant still has the ability to remove to federal court and invoke what essentially becomes our federal question jurisdiction if they would rather be in federal court. So we still have to determine whether, in essence, there is a vindication of an important federal interest that's pled in this case even though you are pleading a state law claim of action, and that's what it seems to me we are trying to sort out here.

MR. SCHAEFFER: In response to that analysis, Your Honor, I think that the proper jurisdiction is the state court because that is where the plaintiff has his remedy as to quiet title. He does not have a remedy in federal court as to quiet title of this piece of property. Even though the quiet title action may be determined on whether or not there was proper title and application of the notice provision of the IRS code, the cause of action is nonexistent in the federal court for the plaintiff to get the relief that he seeks, that being quieting title of ownership title of this particular piece of property. That's why I believe that the state court is the proper jurisdiction for this because the state court has the remedy available to the plaintiff by reviewing the federal statute to make that determination.

THE COURT: Well, if the defendant is correct that there is federal question jurisdiction here even though you are pleading a state law cause of action, because this involves construction of a federal statute and vindication of an essential or an important federal interest, and that's essentially what the defendant claims here, it seems to me -- and Mr. Walton will get a chance to address this in a minute -- it seems to me it would be then incongruous for the defendant to then say that the federal court wouldn't have the jurisdiction to grant the remedy that you are seeking if in construing the federal statute it was construed in favor of the plaintiff in this case. At a minimum would I not have supplemental jurisdiction in order to give that remedy?

MR. SCHAEFFER: I don't think so, Your Honor.

THE COURT: Supplemental jurisdiction by definition accompanies federal question jurisdiction. It doesn't accompany diversity jurisdiction.

MR. SCHAEFFER: I don't think this is a federal question case that would make it a federal court case. I think

it's a state cause of action with the application of federal law, but I don't think it is a state -- a federal question case, and I'm not sure that the supplemental jurisdiction is such that would be appropriate for the federal court to be determining a quiet title action in relation to the state property.

THE COURT: Well, that's an interesting question. I hadn't looked at it in exactly that way. There are a number of cases, as I said before, that the defendant cites where it appears as if federal courts just assumed that, because there was a construction of the Internal Revenue Code involved, that the federal court had original subject matter jurisdiction. Did you look at those cases to see if there was a remedy that was then given in the form of a quiet title award?

MR. SCHAEFFER: I did not determine if there was, Your Honor. If I recall, some of the cases cited by defendant were not third party cases but involved the -- a government as a party, whereas in this particular case as it sets now there is not a governmental party to this action.

THE COURT: I agree with you that we should disregard those cases where the United States was a party because clearly, if you had sued Darue and the United States government acting through the Internal Revenue Service, there is original federal question jurisdiction by virtue of the statute that vests this court with jurisdiction over all suits against the United States, assuming that you can get by any kind of immunity defenses.

I'm also not persuaded even a little bit by the allegation that at some point the United States might be brought in as a third party. I agree with you, they're not here, so we can ignore them as far as I'm concerned.

Are there any of the other cases that are cited by the defendant where the IRS was not a party where the court just assumed that this was properly in federal court?

MR. SCHAEFFER: None that I am able to point out to the court right at the moment, Your Honor.

THE COURT: All right. Well, it's an interesting question. Any other argument that you want to make, Mr. Schaeffer?

MR. SCHAEFFER: Your Honor, I believe that I have beaten to death in my pleadings my positions on this and I think they're well founded in case law, and I will stand on those arguments, Your Honor.

THE COURT: All right. Thank you.

Mr. Walton, let's take perhaps the simplest of these. What's your position on Mr. Schaeffer's contention that this court would not have the power to grant the relief that he's seeking if this court retained jurisdiction?

MR. WALTON: Your Honor, this court does have that jurisdiction, as you have pointed out.

THE COURT: You are conceding that.

MR. WALTON: I am, Your Honor.

THE COURT: And you would not argue, if I denied the motion to remand, that I couldn't grant the relief sought in the complaint.

MR. WALTON: I will not make that argument.

THE COURT: What is your legal analysis as to where I derive the authority to grant the relief?

MR. WALTON: I believe it is under, as I've pointed out in my brief, Your Honor, the 28 USC 1331 and 28 USC 1441 as a cause which arises under the Constitution, treaties, or laws of the United States, and Your Honor has already pointed out, I think, an excellent understanding of that area. There are a couple of arguments which I have which I would add to what the court has already indicated, that this case has at its origin a contention that there is a violation of either section 6335 and/or section 6339 because the Internal Revenue Code failed to meet the necessary notice requirements in order to vest title in the current record titleholder of the real estate.

THE COURT: How did the IRS get title here?

MR. WALTON: It was, to my understanding, Your Honor, a foreclosure for failure to pay taxes.

THE COURT: And then the IRS turned around and sold it to your client?

MR. WALTON: That is accurate, Your Honor. I believe that there are several points that I would make, if I might proceed, Your Honor, or do you have questions?

THE COURT: You may.

MR. WALTON: Thank you.

As you have pointed out, paragraphs 10 and 11 of the complaint raise the federal issues which we have just spoken about. I believe that this case arises under the law of the United States because the plaintiff's claim is going to be sustained if the law of the United States is given one construction and it's going to fail if it's given another construction. I think that the state law is not, under any stretch of the imagination, the basis for this claim.

Perhaps, as Mr. Schaeffer pointed out, he indicated he felt there was a chicken-and-an-egg-type argument here. The way I characterized it in my analysis is that what the state law does is it provides the vehicle for asserting the claim, a quiet title action. However, the basis for the claim arises in whether or not the Internal Revenue Service complied with the federal statutes, and in that respect the only conclusion which can be reached is whether this -- is that this has arisen under the laws of the United States. The dispositive issue in this case is not founded in state law. It is founded in the United States Code. The substantive law here which creates the cause of action is the federal law.

Under all of these analyses, Your Honor, I believe that the only conclusion that can be reached is that this arises under the laws of the United States, and, therefore, this court has subject matter jurisdiction, and I have conceded the other jurisdiction, although I believe, as Your Honor points out, ancillary jurisdiction would grant that to the court as well.

THE COURT: All right. Thank you.

MR. WALTON: Thank you, Your Honor.

THE COURT: Mr. Schaeffer, anything further?

MR. SCHAEFFER: The only point I'd like to bring out is the Moody case cited I think addressed the concerns and the issues that we have before the court pretty close factually and legally and found --

THE COURT: On which page is that discussed? Page 2?

MR. SCHAEFFER: 2, yes, Your Honor, and I had provided a copy of that. It's a Fourth Circuit case --

THE COURT: This is an unpublished Fourth Circuit case?

MR. SCHAEFFER: Yes, that's correct. And I believe that the facts were very similar to what we have here, and they determined it was a state cause of action and that the federal court was not in the business, if you will, of quieting title to state land.

THE COURT: All right. Thank you.

This case raises an interesting jurisdictional question. The plaintiff has moved the court to remand this action to the Eaton County Circuit Court, contending that its complaint asserts a simple quiet title action under state law. The defendant, Darue Engineering & Manufacturing, which removed this action to this court based on federal question jurisdiction and which bears the burden of establishing subject matter jurisdiction, contends that this action does indeed "arise under" federal law.

Now, there is great question in this court's mind whether the federal law creates this cause of action, as Mr. Walton appears at least in part to argue, or rather whether vindication of what the plaintiff contends is a state law right necessarily turns on some construction of federal law, as Mr. Walton alternatively argues. Either would be sufficient to establish federal question jurisdiction in this court under Franchise Tax Board versus Construction Laborers Vacation Trust, 463 U. S. 1 at 9 (1983).

While resolution of this question does depend, as the plaintiff argues here, on the well-pled complaint rule, removal based on federal question jurisdiction is proper only if the federal question appears on the face of the complaint. Warner versus Ford Motor Company, 46 F. 3d 531 at 533 (6th Cir. 1995).

Turning, then, to the plaintiff's complaint, the court has reviewed in detail paragraphs 10 and 11 of the plaintiff's complaint. The plaintiff alleges the basis for its claim that the defendant's deed is void and therefore represents an illegitimate cloud on the plaintiff's title to the subject property expressly and exclusively on the contention that the Internal Revenue Service failed to strictly comply with the notice requirements of 26 USC section 6335(a) before selling the subject property to Defendant Darue at a tax sale. Construing these essential provisions of the plaintiff's complaint, it does appear that in order for the plaintiff to prevail, that the plaintiff will have to establish a proposition of federal law as an essential element of its claim. To this extent, therefore, a federal question does appear to be presented on the face of the complaint.

This conclusion appears to be confirmed by the relatively recent decision of the Sixth Circuit in Long versus Bando Manufacturing of America, 201 F. 3d 754 (6th Cir. 2000). This case interpreted the decision of the United States Supreme Court in Merrell Dow, 478 U. S. at 805, wherein the Supreme Court clearly left open the possibility of federal jurisdiction even in the absence of an express or implied federal cause of action. The Sixth Circuit held that a federal court has jurisdiction "... if a substantial federal question of great federal interest is raised by a complaint framed in terms of state law, and if resolution of that federal question is necessary to the resolution of the state-law claim." The Sixth Circuit noted with favor the case of City of Chicago versus International College of Surgeons, 522 U. S. 156, affirming that a case may "arise under" the laws of the United States if it requires resolution of a substantial question of federal law even if state law creates the plaintiff's cause of action.

In this case a legitimate argument can presumably be made as to whether the question of federal law raised in this complaint, i.e., the application of 26 USC section 6335(a), is

in fact a "substantial question" of federal law. In this court's considered opinion, the answer to that question has to be in the affirmative. In no other way would purchasers of property from the federal government that was acquired in tax sales have the ability to rely upon the title they received from the Internal Revenue Service if the law required that, every time a dispute between the federal government and a taxpayer arose, the purchaser at tax sale had to defend that title in state court over claims that the Internal Revenue Service had failed to follow federal law, particularly where in most, if not all, such actions there is no reason for the taxpayer to have even been aware at the time of the purchase at the tax sale of compliance or lack of compliance by the Internal Revenue Code of federal law.

Accordingly, this court concludes that the plaintiff's claim does pose a "significant question of federal law."

Pursuing the analysis of the Sixth Circuit in Long versus Bando Manufacturing of America, supra, further, the court finds that the complaint does not set forth alternative theories of relief that might otherwise justify this case remaining in state court.

The court is not unmindful of the unpublished opinion of the Fourth Circuit relied upon by the plaintiff, Smith v. Moody, 1993 U. S. App. LEXIS 29984 (4th Cir. Nov. 19, 1993). However, this is an unpublished per curiam opinion that is not binding on this court, and because it includes no analysis of the Long considerations, the court finds that it has little or no persuasive value to this court.

The court in no way means to suggest in this opinion from the bench that a state court is not competent to adjudicate a claim of this type, notwithstanding the existence of the federal law question. The precise question here, however, is whether the defendant, Darue, is nevertheless

entitled to remove this action to federal court. This court finds that the defendant is so entitled, and, accordingly, the motion to remand is denied.

That decision, of course, makes the request of the plaintiff for fees and costs moot. The defendant in its reply seems to only be responding to the plaintiff's request for fees and costs. If I'm reading that incorrectly to the extent that the defendant is making a claim for fees and costs, it is denied as well in light of the unsettled law on this question and the relatively close question presented by this matter.

Anything further to come before the court, Mr. Schaeffer?

MR. SCHAEFFER: Nothing further, Your Honor.

THE COURT: Mr. Walton?

MR. WALTON: Yes, Your Honor. Might I approach the podium?

THE COURT: You may.

MR. WALTON: As Your Honor may recall from the brief which we submitted, at the time that this matter was initiated, a timely motion for summary disposition was filed in the state court action. A default was entered under circumstances detailed in our brief despite the fact that that motion had been timely filed. The basis of the motion was the failure of plaintiff to have the requisite certificate under state law as a corporation, that it had expired. The plaintiff has since then provided me with a copy indicating their certification under state law has been reinstated.

I would suggest that it might be best procedurally if I withdrew that motion, which I am willing to do if the

plaintiff is willing to provide me with a window of time to file a response, and I would suggest I can do that within 14 days.

THE COURT: I'm just looking at the work file that I brought with me to the bench, and I'm trying to recall whether there has even been a Rule 16 conference in this case, because I don't find a case management order in the file.

MR. WALTON: There has not, Your Honor.

THE COURT: Would that not be more logically taken up at the Rule 16 conference or worked out between you and Mr. Schaeffer?

MR. WALTON: I am perfectly willing to approach it that way. It is, Your Honor, a procedural obstacle to my filing a response to the complaint at this point. I'm simply seeking to move it aside so that I can file the answer. I'll try and work it out.

THE COURT: Mr. Schaeffer, do you have any objection to what apparently is an order having been entered by the state court being set aside in this case?

MR. SCHAEFFER: No, Your Honor, but I don't think it's appropriate to bring it up at this time. A phone call from opposing counsel would probably resolve most of these procedural matters.

THE COURT: Well, I do think it's important, to move this along, to get the answer filed and let's get the Rule 16 scheduled. For whatever reason, Mr. Walton thinks he can't even do that.

MR. SCHAEFFER: This is the first I've heard of this, and if that's an obstacle, a phone call is going to remedy whatever problem he perceives.

THE COURT: All right. With that assurance from Mr. Schaeffer, who has appeared here many times and whose word has been good, as far as I'm concerned, we'll schedule this for a Rule 16 and we'll take that up and whatever other scheduling issues need to be addressed at that time.

(Proceedings concluded at 2:10 P.M.)

REPORTER'S CERTIFICATE

I, Sharon E. Fox, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that on the date hereinbefore set forth I reported stenographically the proceedings had in the within-entitled and numbered cause; and I do further certify that the proceedings were transcribed by me with the use of computer-aided transcription under my direction and supervision and that the foregoing is a full, true, and accurate transcript of my original stenotype notes.

s/ Sharon E. Fox
Sharon E. Fox (CSR-3342)
U. S. District Court Reporter
315 West Allegan Avenue
Lansing, MI 48933

APPENDIX 2

COMPLAINT TO QUIET TITLE, FILED IN THE CIRCUIT COURT FOR THE COUNTY OF EATON, STATE OF MICHIGAN, DATED AND FILED: DECEMBER 14, 2000

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE
COUNTY OF EATON

GRABLE & SONS METAL PRODUCTS, INC.,
a Michigan Corporation,

Plaintiff, Case No. 2000-1560-CH

v

DARUE ENG & MFG, INC.,
a Michigan Corporation,

Defendant

J. Thomas Schaeffer P19950
Attorney for Plaintiff
206 S. Kalamazoo
Marshall, MI 49068
(616) 781-5193

Darue Eng & Mfg, Inc.
224 W. Main St.
Eaton Rapids, MI 48827

COMPLAINT TO QUIET TITLE

Now comes Leslie A. Grable, President of Grable & Sons Metal Products, Inc., and for complaint against Defendant says:

1. Plaintiff is a Michigan corporation located at P.O. Box 299, Dimondale, Michigan 48821.

2. Defendant is a Michigan corporation located at 224 North Main St., P.O. Box 239, Eaton Rapids, MI 48827.

3. This matter involves an amount in excess of $25,000 and further jurisdiction is awarded in relation to a quiet title action to real estate.

4. Plaintiff is the owner in fee of certain property located at 607-701 – West Plains Road, Eaton Rapids, MI 48827, the legal description of which reads as follows:

City of Eaton Rapids, Eaton County, Michigan
That part of the N fractional 1/2 of the NE fractional 1/4 of Section 4, T1N, R3W, City of Eaton Rapids, Eaton County, Michigan; Commencing on the N line of the right of way of the Michigan Central Railroad Company, at a point 15 rods E of the N & S 1/4 line of said Section 4, thence E'ly along said right of way line, to the W'ly line of the N.Y. Central R.R. Co.; thence N'ly along said right of way line to a point 25 rods S of the N line of said Section 4; thence W to a point 18 rods E of the N & S 1/4 line of said Section 4; thence S'ly to the place of beginning; Except two parcels described as:
(1) That part of the N fractional 1/2 of the N.E. fractional 1/4 of Section 4, T1N, R3W, beginning at the intersection of the N'ly property line of the Michigan Central R.R. Co.; with the W'ly property line of the N.Y. Central R.R. Co.; thence N'ly along said W'ly property line 156.7'; thence SW'ly at an angle of 35"33' with the last described line 327.87' to a

point on said N'ly property line; thence E'ly along said N'ly property line 220.12' to the point of beginning;
(2) That part of the N fractional 1/2 of the NE fractional 1/4 of Section 4, T1N, R3W, City of Eaton Rapids, Eaton County, Michigan, beginning on the W'ly line of the N.Y. Central R.R. N 27" E 156.7 ft. from the intersection of the W'ly line of said N.Y. Central R.R. N 27 degrees E 156.7 ft. from the intersection of the W'ly line of said N.Y. Central R.R. and the N'ly line of the Michigan Central RR; thence N 27 degrees E along the W'ly line of the N.Y. Central R.R. – 177.4 ft.; thence N 86 degrees W – 179 ft.; thence S 4 degrees West – 229.6 ft. to a triangular parcel owned by the Railroad Company; thence N 62 degrees 35' E along the N'ly property line of said triangular parcel – 127.4 ft. to the beginning. Also the right of ingress and egress over the 66 ft adjacent to this premises on the north; (end of description).
Commonly known as: 601-701 W. Plains Rd; Eaton Rapids, Michigan 48827.

5. Plaintiff received his interest in the property from David T. Phillips, a single man, pursuant to a warranty deed, a copy of which is attached hereto as Exhibit 1.

6. That there is a cloud on title to said property based on a deed to Defendant Darue Eng & Mfg, Inc. attached as Exhibit 2.

7. That pursuant to Form 2436 from the Department of Treasury the alleged sale was on December 16, 1994 a copy of which is attached as Exhibit 3.

8. That on December 16, 1994, the hereinafter-stated Defendant converted property owned by Plaintiff and has refused to return said property even though demands have been for such return.

9. By Defendant's conduct it has continued to claim an interest in the property, and upon information and belief, has made statements that it still considers the property belongs to it.

10. That the claim of the Defendant is invalid because the interest from which it claims, to-wit the Deed, attached as Exhibit 2, was given with improper notice pursuant to 26 USC 6331, et. seq.

That Plaintiff was not served pursuant to said requirement in that it was not given to it or was not left at the usual place of abode or business that existed within the Internal Revenue District where the seizure was made.

11. That since the tax deed was given pursuant to improper notice as required by 26 USC 6335(a), said transfer and claim through the tax deed is null and void and void ab initio.

12. Defendant's claim to said real estate has placed a cloud on said title and that by the non-validity of the tax deed Defendant retains no legal or beneficial interest in this property.

WHEREFORE, Plaintiff prays that:

(A) Defendant be ordered to have no right, title or interest whatever in or to the above described premises or any part thereof and that Defendant be enjoined from interfering with the use of the property by Plaintiff, its heirs, and assigns.

(B) Plaintiff have such other and further relief as may be ordered by this Court.

(C) Plaintiff be awarded reasonable costs and attorney fees.

Dated: December 14, 2000

GRABLE & SONS METAL PRODUCTS, INC.
Plaintiff

By: s/ Leslie A. Grable
Leslie A. Grable, its President

Prepared By:

s/ J. Thomas Schaeffer
J. Thomas Schaeffer
Attorney for Plaintiff

(4)

No. 04-603

OCTOBER, 2004 TERM

GRABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Charles E. McFarland
Counsel for the Petitioner
338 Jackson Road
New Castle, KY
(502) 845-2754

Attorney for Petitioner

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORI

A. Introduction.

Pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States, the Petitioner may file a reply brief to address new points raised in the Brief in Opposition. In addition, Rule 15.2 admonishes counsel that misstatements of fact and law should be addressed at the petition stage or they will be deemed waived. Accordingly, Petitioner herein sets forth its reply addressing several new points raised through misstatements of fact and law made in Respondent's Brief in Opposition.

B. United States Not a Party to For Establishing Original Jurisdiction.

The first issue raised by the Petitioner Grable addresses the question of whether there was a substantial federal question to give removal jurisdiction to the district court in state quiet title action. On page 10 of its Brief in Opposition Respondent Darue raises a new point regarding the subject matter jurisdiction issue. Respondent claims that the jurisdiction issue in this case is now moot. The claim of mootness is based on Respondent's erroneous conclusion of the consequences of its attempt to interplead the United States as a party. According to Respondent, the United States is a party by virtue of 28 U.S.C. §2410. Consequently, pursuant to 28 U.S.C. §§ 1340 and 1346, the district court did have original jurisdiction and the issue of jurisdiction is moot. The facts of the case and the law belie Respondent's erroneous contention.

This case was originally a quiet title action filed in the State of Michigan. Respondent removed it to the United States District Court for the Western District of Michigan by. The issue of jurisdiction arose via

Petitioner's motion to remand and the district court's subsequent denial of its motion.

The United States was not a party in the original filing. The United States only named as a third-party to the action when respondent erroneously attempted to bring in the government as a third-party. The United States filed a motion to dismiss the third-party complaint for lack of jurisdiction, in that sovereign immunity had not been waived. The Honorable David W. McKeague declined to immediately address the motion to dismiss. The third-party complaint was eventually dismissed as moot without the court having addressed the merits of the government's claims of lack of jurisdiction. The law, however, dictates that the United States was not a proper party to this case. Thus, as a matter of law, the naming the government as a third-party in this case did not make them a party in the case for the purpose of establishing federal jurisdiction..

28 U.S.C. §2410 is the foundation of Respondent's claim that the United States should be a party to this quiet title action. §2410(a) states in pertinent part,

> Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in any State court having jurisdiction of the subject matter – (1) to quiet title; ... or (5) of interpleader or in the nature of interpleader with respect to, real or personal property on which the United States has or claims a mortgage or other lien.

There is a key prerequisite that Respondent fails to comprehend by insisting that the United States is a party. That crucial element is that the United States must claim a mortgage or other lien on real property. In this case the government specifically denied that it had a claim or other

interest in the property subject to the quiet title action. The lone case cited by Respondent as an alleged authority for the government being a party is *Aqua Bar & Lounge, Inc. v. United States Dept. of Treasury*, 539 F.2d 935 (2d Cir. 1976). Even the quotation from *Aqua Bar* by Respondent refers to the requirement that there must be a lien claimed by the United States. Since the United States did not have a lien, neither does it claim any other interest, neither section 2410 nor *Aqua Bar* give any foundation for the United States being a party. In short the government was never a proper party, let alone a necessary party as claimed by Respondent.

Respondent's reliance on 28 U.S.C. §§1340 and 1346 is predicated on §2410. Without §2410 sections 1340 and 1346 also fail to give jurisdiction.

Accordingly, because the United States specifically stated that it did not claim any lien or other interest in the subject property, the Supreme Court should ignore the new point raised by Respondent that the jurisdiction issue is moot because the United States is a party.

C. New Points Raised Through Misstatement of Facts.

One of the crucial factual elements of the second issue raised by Petitioner is whether the IRS complied with the personal service provisions of the notice requirements contained in 26 U.S.C. §6335(a).

At the District Court level the relevant facts of the case were stipulated by the parties prior to submission of the issues. No evidentiary hearing was held. Thus, no evidence, other than that stipulated, was admitted. Based on the evidence agreed upon by the parties the Honorable Judge David W. McKeague found that, "The relevant facts are not disputed," Pet. App C, at page 15. Furthermore, Judge McKeague also found that, "The United States conceded that the conditions prerequisite to authorized

service by mail were not met," Pet. App. C, at page 16. The 6th Circuit decision also acknowledged the undisputed nature of the facts by stating, "The parties agree that the IRS failed to adhere to the exact provisions of the statute ... ," Pet. App. At page 3.

Darue now alleges new and inconsistent facts that have not been made a part of the record. This impropriety is inserted via footnotes 3# 1, 2, and 3 accompanying the Factual History on pages 2 and 3 of the Respondent's Brief in Opposition. Respondent introduces contradictory factual statements in footnote #2 which reads,

> During the Rule 16 Scheduling Conference, the Tax Division Attorney stated that an agent went to Grable's home to personally serve him the notice of seizure on his property but was unable to serve Grable. Thereafter, the agent sent the notice by certified mail. There was also considerable testimony in the hearing before Judge Quist on the United States Marshal's attempts to serve Grable with an order for entry to seize assets. The Grables routinely refused to answer the door and even closed a window on one of the Marshal's hands.

The facts alleged in footnote #2 were not a part of the record in the district court. These facts were never 'proven' or offered as evidence. Furthermore, from the language in the footnote referring to Judge Quist and to a US Marshal, it is more likely that these hearsay statements may have been made during a Rule 16 Scheduling Conference in another case in which Grable may have been personally involved., rather than in this case. Language that lends further support to this view that the Rule 16 Scheduling Conference may not have been in this case is found in the phrase, "the Tax Division Attorney stated that an agent went to Grable's home to personally serve him the notice of seizure on ***his*** property but was

unable to serve Grable. Grable had other cases where he was personally involved. But in this case, 'Grable' represents a corporation. Thus, an agent could not have attempted to serve a notice of seizure on ***his*** property.

The improper introduction of this 'new evidence' tends to cloud the issue of whether the IRS substantially complied with the notice provisions requiring personal service or leaving the notice at the place of residence or business. The IRS was never required to prove that it attempted, but was unable, to personally serve Grable. If such were the case then the backup service through certified mail might very well have been proper. Nevertheless, the stipulated evidence did not include an attempt to personally serve the required notice.

The facts were stipulated before the district court and an attempted personal service was not among the facts agreed upon. To introduce unverifiable and unrecorded facts at the Supreme Court level is highly improper and should be ignored by the Court.

The same is true of the allegations made by Respondent in footnotes #1 and 5 of its Brief in Opposition. An additional observation is that the history of the Grable family is not at issue in this case, only facts relating to the corporation of Grable & Son Metal Products, Inc. have any bearing on the issues presented to the Court. In footnote #5 Respondent refers to Appendix C as authority to suggest that Grable owes the government over 2 million dollars in taxes. Appendix C contains no such statement. Those allegations calling attention to facts not in evidence, or matters in other cases should be ignored by this Court.

D. Conclusion.

Respondent does not want the two issues raised by Petitioner heard by the Supreme Court so it must attempt to direct the Supreme Court's attention away from the

relevant facts by introducing the new points of the United States being a party and new facts not in the record.

As a further example of its desperate attempt to prevent a writ of certiorari from being granted, Respondent boldly states on page 18 of its Brief in Opposition, "There are no splits in the circuit[s] regarding I.R.C. §6335." This is a complete contradiction to the view held by the district court. There the court found, "Plaintiff's claim finds support in the case law." Pet. App. C at page 16. Judge McKeague thereafter lists five cases that he felt tended to support Grable's view of the requirement strict compliance relating to 26 U.S.C. §6335(a) notice provision. Three of these cases are from three different circuits of the United States Appeals Courts. They are, *Goodwin v. United States*, 935 F.2d 1064 (1991); *Kulawy v. United States*, 917 F.2d 729 (2nd Cir. 1990); and *Reese v. Scoggins*, 506 F.2d 967, 969 (5th Cir. 1975). The sole circuit case relied on by Judge McKeague was *Kabakjian v. United States*, 267 F.3d 208 (3rd Cir. 2001). There is indeed a split among the circuits.

No introduction of new points including misstatement of facts and allegations improper parties should prevent this Court from visiting the issues presented by Petitioner. This Court must accordingly grant the Petition for a Writ of Certiorari.

For the foregoing reasons, the new points raised by Respondent should be ignored and the Petition for a Writ of Certiorari should be granted.

Dated December 11, 2004

Respectfully submitted

Charles E. McFarland
Counsel for the Petitioner
338 Jackson Road
New Castle, KY
(502) 845-2754

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No. 04-603

OCTOBER, 2004 TERM

GABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF ON THE MERITS

Charles E. McFarland
Counsel of Record
338 Jackson Road
New Castle, KY
(502) 845-2754

Attorney for Petitioner

QUESTION FOR REVIEW

SUBSTANTIAL FEDERAL QUESTION AND ORIGINAL JURISDCITION IN DISTRICT COURT ARE PREREQUISITES BEFORE REMOVAL OF A STATE CASE TO FEDERAL DISTRICT COURT

28 U.S.C. §1441(b) allows removal of any state civil action in which the district courts have original jurisdiction wherein the claim is founded on a right arising under the Constitution, treaties or laws of the United States. This Court has routinely held that such removal requires both a substantial federal question and the district court must have original jurisdiction over the action.

The question for the Supreme Court to address is therefore, when there is a violation by the IRS of 26 U.S.C. §6335(a) by intentionally ignoring the prerequisite provision requiring personal service of notice of seizure before obtaining service by certified mail, whether the defendant in a state quiet title action can remove the action by claiming that the necessary interpretation of 26 U.S.C. §6335(a) as to whether strict compliance or substantial compliance with the statute constitutes a substantial federal question and creates original jurisdiction in the district court.

DISCLOSUE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERSTS

Pursuant to Sup. Ct. Rule 29.6 Garble & Sons Metal Products,Inc states:

1. It is not a subsidiary or affiliate of a publicly owned corporation; and

2. There is no publicly owned corporation that is not a party to this petition that has an interest in the outcome.

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OPINIONS BELOW

The order of District Court for the Western District of Michigan (per McKeague, D.W.) denying the petitioner's motion to remand, Writ Petition App. C at 12, is unpublished. The District Court's subsequent opinion granting judgment as a matter of law for Darue against Grable's action in quiet title is published at *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 207 F.Supp.2d 694, 697 (W.D. Mich 2002), Writ Petition App. B. The 6th Circuit Court of Appeal's opinion (per Chief Judge Boggs, joined by Circuit Judge Daughtrey and District Judge Aldrich) affirming the District Court's decision is published at *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 377 F.3d 592 (6th Cir. 2004), Writ Petition App. A at 1. A motion for rehearing was not made, nor was a stay of mandate sought. A Petition for a Writ of Certiorari was filed by Grable and the Writ was issued on January 7, 2005 for the issue of jurisdiction only.

STATEMENT OF JURISDICTION

The 6th Circuit Court of Appeals entered its opinion and order on July 27, 2004. Petitioner timely petitioned for a Writ of Certiorari on October 25, 2004, which was granted by this Court on January 7, 2005. 28 U.S.C. §1254(1) provides,

> **§1254. Courts of appeals; certiorari; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; …

Accordingly, since a petition for a writ of certiorari was timely made and was issued by the Supreme Court, this has jurisdiction to review this case.

STATUTORY PROVISIONS INVOLVED

The following legal authorities are cited in the Brief on the Merits:

Article III, Section 2, Constitution of the United States of America;

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority."

28 U.S.C. §1331 reads:

> "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States."

28 U.S.C. §1340 reads:

> "The district courts shall have original jurisdiction of any civil action arising under and Act of Congress providing for the internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Court of International Trade."

28 U.S.C. §1441(a) in pertinent part:

> "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the

> defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

28 U.S.C. §1441(b) in pertinent part states,

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

28 U.S.C. §1447 is set forth in the appendix.

26 U.S.C. §6335(a) is set forth in the appendix.

26 U.S.C. §6339(b) including subsection **(2)** is set forth in the appendix.

MCL §600.2932 is set forth in the appendix.

Rule 3.411, Michigan Rules of Civil Procedure is set forth in pertinent part in the appendix.

I. STATEMENT OF THE CASE.

The Petitioner, Grable & Sons Metal Products, Inc. (Grable), is a corporation organized under the laws of the State of Michigan. Grable initiated a quiet title action in the Circuit Court for the County of Eaton, in the State of Michigan (Writ Response, App 2). The quiet title action arose under Michigan law, MCL §600.2932. The action was filed pursuant to Rule 3.411 of the Michigan Rules of Civil Procedure. The quiet title action named Darue Engineering & Manufacturing, Inc. (Darue) as the defendant. The United States was not named as a party.

Grable sought to quiet title to certain real estate located at 601-701 W. Plains Road in Eaton Rapids, Michigan. This property was allegedly seized by the IRS in 1994 to satisfy an unpaid tax assessment. The Grable complaint alleged as part of its quiet title cause of action that a cloud was created on the title of the property due to a void tax sale. The sale was fatally marred because the IRS failed to personally serve the corporation with the notice of seizure as required by 26 U.S.C. §6335(a) (Writ Response, App 2 at page 4-A). All the parties agree that the IRS failed to personally serve the corporation. The IRS later purported to sell the property through an auction to Darue in 1994. The IRS provided Darue with a quitclaim deed dated November 13, 1995.

Petitioner filed the quiet title action in Michigan on December 14, 2000. Darue removed the quiet title action to the United States District Court in the Western District of Michigan, Southern Division on January 16, 2001 (Doc #1 Notice of Removal, 6th Cir. APX, at 011-023). Grable sought a remand of the action (Doc #4, Motion to Remand, 6th Cir APX, at 039-044), but the district court denied the request on April 2, 2001 (Writ Petition, App B). The district court held that, due to the necessity of the

interpretation of the requirements of 26 U.S.C. §6335(a), it had jurisdiction pursuant to 28 U.S.C. §1331 over the matter because there was a federal question involved.

Grable appealed to the Sixth Circuit Court of Appeals. The 6th Circuit panel ruled that Grable had asserted a federal right because the interpretation of a revenue law was required for the resolution of the case. According to the 6th Circuit, Grable's claim was therefore a federal question rooted in the Internal Revenue Code. Due to the presence of a federal question the 6th Circuit held that the District Court had original jurisdiction (Writ Petition, App A).

Grable timely petitioned this Court for a Writ of Certiorari on October 25, 2004. The Court granted the writ on January 7, 2005 for the limited issue of jurisdiction.

II. SUMMARY OF JURISDICTION ARGUMENT

Plaintiff Grable filed a quiet title action against Defendant Darue alleging a violation of 26 U.S.C. §6335(a) which required personal service on the owner of the property of a notice of seizure. All parties agreed that no personal service as required by the statute was attempted by the IRS. Defendant Darue removed the case from the Eaton County Circuit Court to the Federal District Court for the Western District of Michigan, Southern Division claiming that the removal was proper due to the presence of a federal question under 28 U.S.C. §1441(b) because of the alleged violation of federal law, i.e. §6335(a). Defendant Darue also claimed that the removal was proper because the action arose under the Internal Revenue Code.

Removal can in fact be authorized if the cause of action filed in the state court was in fact a cause of action arising out of the United States Constitution or laws, or if the

state cause of action presents a substantial federal question. A third basis of removal, diversity of citizenship is not at issue in this case.

It is well established legal procedure that when determining whether a state case contains a substantial federal question sufficient to cause removal the courts first look to the well pleaded complaint. A case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue. The Supreme Court has held that the well-pleaded complaint rule applies to the original jurisdiction and removal jurisdiction of the district. See *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463, U.S. 1, 13 77 L.ED2d 420, 193 S.Ct. 2841 (1983); *Merrell Dow Parmaceuticals, Inc., v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed2d 650 (1986); and *Beneficial National Bank v. Anderson*, 539 U.S. 1, 156 L.Ed2d 1, 123 S.Ct. ___ (2003).

The 6th Circuit disregarded the well-pleaded complaint rule and developed its own arbitrary three part test to determine the presence of a federal question jurisdiction. The three part test set forth by the 6th Circuit panel was faulty in that: 1.) the test enabled Darue to skirt its burden to prove original jurisdiction; 2.) the three part test resulted in the creation of federal jurisdiction based upon the mere violation of federal law and/or standards; and 3.) the test negated the well established need for a federal private right of action as required by *Franchise Tax Board, Merrell Dow,* and *Beneficial.*

Darue was required to shoulder its burden of establishing that the District Court had original jurisdiction. The 6th Circuit, instead of requiring Darue to meet its burden, held that there was a federal question present due to the

alleged violation of federal in §6335(a). The 6th Circuit's reasoning is inconsistent with this Court's decision in *Merrell Dow Parmaceuticals, Inc., v. Thompson*, supra, because Grable only alleged a violation of 26 U.S.C. §6335(a). Congress did not provide a private federal remedy or a private federal claim for such a violation.

This case is now before this Court to determine if an intentional violation federal law, i.e. the personal service requirements of 26 U.S.C. §6335(a), where there is no private federal remedy, can be elevated to the status of a substantial federal question because the defendant alleges that a construction of federal law, i.e. 26 U.S.C. §§6335(a) and 6339(b)(2) is required to determine the outcome.

III. ARGUMENT ON THE MERITS

SUBSTANTIAL FEDERAL QUESTION AND ORIGINAL JURISDCITION IN DISTRICT COURT ARE PREREQUISITES BEFORE REMOVAL OF A STATE CASE TO FEDERAL DISTRICT COURT

A. Introduction.

Petitioner Grable filed a quiet title action in the State of Michigan alleging that the title to property it claimed was clouded by the adverse real estate title claims of Darue. Within its state quiet title action Grable alleged that there was a cloud on its title to real estate because Darue claimed to have a title stemming from the IRS issuing a quitclaim deed based on a purported tax sale. 26 U.S.C. §6335(a) made it a requirement, prior to the sale, that the owner of the property be personally served in writing with the notice of seizure or the notice be left at the owner's place of abode or business a requirement (hereinafter referred to as 'personal service requirements'). All parties agreed that the IRS made no

attempt to fulfill the legal requirements of 26 U.S.C. §6335(a). Darue, using 28 U.S.C. §1441(b) as its authority, removed the state quiet title action to the Western District of Michigan alleging that there was a substantial federal question involving the interpretation of the personal service requirements of 26 U.S.C. §6335(a). The district court denied Grable's motion to remand and the Sixth Circuit upheld that denial.

The actions and manner in which the Sixth Circuit arrived at its decision to uphold the denial of the remand so far departed from the usual course of judicial proceedings and permitted the Western District Court of Michigan to depart from the normal removal procedures that this Court's supervisory power is needed to correct error. The 6th Circuit should have corrected the district court's jurisdictional error in denying Grable's motion to remand by addressing the jurisdictional statute that Darue relied upon to remove the state quiet title action and the district court upheld. But instead, the Sixth Circuit mixed and matched several jurisdictional statutes to arrive at an incorrect and unsupported rationale to affirm the district court's denial of Grable's remand motion.

B. General Removal Considerations.

The issue of the jurisdiction of the federal courts is firmly rooted in the Constitution of the United States. Article III, Section 2 states,

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority."

The foregoing constitutional provision was codified in 28 U.S.C. §1331. Section 1331 reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." This also applies to cases filed in state court in which the defendant desires to remove the case to a federal district court.

Under normal and accepted judicial process, when a plaintiff files a state cause of action in the state courts, the defendant has the option of removing the cause of action to a federal district court under the removal statutes provided by Congress in 28 U.S.C. §§1441(a) and (b).

28 U.S.C. §1441(a) in pertinent part states,

> "Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

Through section 1441(a), Congress has permitted a defendant in a state case to remove any civil action to the district court, if the federal court has original jurisdiction. Apparently, the panel for the Sixth Circuit that upheld the district court's denial of Grable's request for a remand was confused as to the exact statute that Darue relied upon to remove the quiet title action to the district court. While Darue removed the quiet title action from state court to the district court based on 28 U.S.C. §1441(b), the Sixth Circuit panel cited 28 U.S.C. §1441(a), see the Sixth Circuit opinion, Writ Petition, App. A at 3.

The second ground for removal, and the one that Darue actually relied upon and the 6th Circuit should have addressed, is 28 U.S.C. §1441(b).

Section 1441(b) in pertinent part states,

> "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

Through 28 U.S.C. §1441(b), Congress has permitted a defendant in a state case to remove any civil action which is founded on a claim or right arising under the Constitution, treaties or laws of the United States to the district court, if the federal court has original jurisdiction. This section has been interpreted to allow removal when there is a 'substantial federal question,' see *City of Chicago v. International College of Surgeons,* 522 U.S. 156, 139 L.Ed2d 525, 535, 118 S.Ct. 523 (1997)

Whether 28 U.S.C. §1441(a) or §1441(b) is the proper jurisdictional foundation for removal in this case, certain legal principles remain the same. *First*, because the jurisdictional removal statutes implicate federalism concerns they must be construed narrowly, *Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100,108-09, 61 S.Ct. 868, 85 L.Ed 1214 (1941). *Second*, one of the prerequisites of the removal statutes is that a defendant must show that the district court to which removal is sought has original jurisdiction over the cause of action, *Syngenta Crop Protection v. Henson*, 537 US 28, 123 S.Ct. 366, 154 L.Ed2d 368, 371 (2002). *Third,* when removal is sought, the burden of proof is on the defendant to show that the district court does in fact have original jurisdiction, *Syngenta* supra, 154 L.Ed2d at 372.

The 6th Circuit Court of Appeals decision to sanction the denial of a remand where the district court did not have jurisdiction is not consistent with the statutes and the holdings of this Court. As such it warrants this Court's review and remand. The decision itself sets forth a three part test for a federal question that is that is not supported by any precedents of this Court because it is incomplete. The decision eliminates the necessity of proving original jurisdiction thereby greatly expanding the limited jurisdiction of the federal district courts in removal situation. The decision also attempts to expand a simple violation of federal law into a substantial federal question, contrary to the holdings of this Court and at least one other United States Court of Appeals. Finally, the decision also eliminates the need to establish the presence of a federally created right of action. Should the Sixth Circuit's decision be allowed to stand it would be an open invitation for all litigants that they may now remove a state case with a simple federal question, or with just a violation of federal law, without having to show original jurisdiction in the district court. Such an open invitation will clog an already overburdened federal judicial system and is contrary to the guidance given by this Court's earlier decisions

C. The Well-Pleaded Complaint Rule.

The decision below conflicts with numerous decisions of this Court and at least one other circuit requiring evidence of original jurisdiction in the federal district court before a removal can stand.

The Sixth Circuit departed from the foregoing standard judicial process by broadly interpreting the jurisdictional statutes, by not requiring the federal district court to have original jurisdiction and by not placing the

burden on the defendant to show the district court had original jurisdiction. An initial matter showing the 6th Circuits departure from the normal procedure must first be addressed.

It is well established law that when the issue of a substantial federal question arises because of a defendant's removal the courts will resort to 'well-pleaded complaint doctrine,' to determine is a substantial federal question is actually present. This Court in *Franchise Tax Board*, supra 463, U.S. at 13 indicated that a federal question jurisdiction might arise where "it appears that some substantial, ***disputed question*** of federal law is a necessary element of one of the well-pleaded state claims," emphasis added. The *Merrell Dow*, supra case and a more recent case, *Beneficial National* supra, also endorse the 'well-pleaded complaint' doctrine.

Under the well pleaded complaint doctrine the alleged substantial federal question must appear on the face of the complaint. Not only must the federal question appear on the face, but it must also be essential for the cause of action and the federal question must be a real controversy, i.e. disputed.

This Court in *Shulthis v. McDougal,* 225 U.S. 561, 569-70, 56 L.Ed2d 1205, 32 S.Ct. 704 (1912) addressed the importance of the need that the federal question actually be disputed.

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which result depends." *Shulthis,* supra.

In Grable's quiet title action filed in Michigan a violation of federal law is alleged in the complaint. As will be seen below, the allegation of the violation of the federal law, i.e. 26 U.S.C. §6335(a) is an essential element of Grable's proof that that cloud exists of the title to real estate. But this is the extent to which the federal question in Grable's complaint meets the well-pleaded complaint doctrine. There is no dispute that 26 U.S.C. §6335(a) was violated. In fact, both parties agree, and the government admitted that the personal service requirements of section §6335(a) were violated.[1]

The final prerequisite for a 'substantial federal question' is a real dispute respecting the federal question. That dispute did not surface until Darue interposed the question of whether 26 U.S.C 6339(b)(2) applied to §6335(a). Thus, the necessary dispute of a federal question was not in fact in Grable's complaint, but rather in Darue's defense. Accordingly, under the well-pleaded complaint doctrine there was no substantial federal question. Grable's quiet title complaint was therefore improperly removed and the district court erred when

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[1] The District Court in New Hampshire was faced with a very similar situation in *Tempelman* v. *Colsia, 2002 U.S. Dist. LEXIS 19037 (D.N.H. 2002)*. In the *Tempelman* case the property sale was made by the U.S. Marshal. The Tempelmans invoked 28 U.S.C. §2001 and §2002 as the grounds for invalidating the deed. The complaint did not challenge the meaning, interpretation, or constitutionality of either statute. Instead, it alleged that the sale of the property did not comply with the statutory requirements. A purely factual issue was raised. The district court found that merely alleging the factual violation a federal statute did not allege a claim arising under federal law, despite the reliance on federal statutes.

it denied the motion to remand. Had the 6th Circuit adhered to the well-pleaded complaint procedure it would have had to reverse the denial of the remand because the district court had no jurisdiction. This Court must correct the 6th Circuit's error.

D. Improper Broad Interpretation of the Jurisdictional Statutes.

Instead of applying the well-pleaded complaint test and rather than directly addressing the question raised on appeal by Grable, the 6th Circuit chose to develop an incorrect alternative rationale to justify its refusal to reverse the district court's decision to keep the removed case. The Sixth Circuit began its Federal Question Jurisdiction discussion, not only with the wrong removal statute 28 U.S.C. §1441(a), but also with an inapplicable jurisdictional statute. The panel recognized 28 U.S.C. §1331 as the correct judicial statute. Section 1331 reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States." The language of section 1331 is basically the same as removal statute of section 1441(b).

The panel did not discuss or examine the applicability of section 1331 to the present case because, in the Sixth Circuit's view, section 1331 took a subordinate place in original jurisdiction scheme. Another jurisdictional statute was felt to be more important. The panel chose to rely on 28 U.S.C. §1340 for original jurisdiction by stating, "The District courts have original jurisdiction over an civil action 'arising under any Act of Congress providing for the internal revenue ... .'" In opting to rely on 28 U.S.C. §1340 the Sixth Circuit departed from the widely accepted principle of construing the removal statutes narrowly, see *Shamrock Oil,* supra. In the process of attempting to broaden the scope for

removal, the Sixth Circuit created a new and an independent original jurisdiction for the district court through 28 U.S.C. §1340. This new and independent jurisdiction through section 1340 is an issue of first impression before the United States Supreme Court.

Had the 6th Circuit followed the normal, accepted judicial reasoning associated with removal statutes it would have adopted a line of reasoning similar to the one below. By following this line of reasoning, or one parallel to it, the Sixth Circuit would have recognized immediately that section 1340 did not give the district court independent original jurisdiction. The line of reasoning the 6th Circuit should have followed is as follows:

Question, "Does this quiet title civil action arise under any Act of Congress providing for internal revenue?"

If the answer is no, the district court lacked jurisdiction and the discussion is over. Unfortunately, the 6th Circuit determined that the answer was yes. Thus, its decision must be closely dissected.

In this case the action is a quiet title action arising from the laws of Michigan. In *American Well Works Company v Lyne & Bowler Company*, 241 U.S. 987, 60 L.Ed 987, 36 S.Ct. 585 (1916), Justice Holmes established a test for determining under what law a suit arises. His simple, but profound observation was, "A suit arises under the law that creates the cause of action." Justice Holmes' test has been repeated cited by both appellate case and this Court. Recently, the test was cited in *Merrell Dow,* supra 92 L.Ed2d at 658. A thoughtful examination of Holmes' reasoning process as applied to this case will show that Grable's quiet title action did not arise under the Internal Revenue Code, but rather, under state law.

In *American Well Works* a suit for damages to a business caused by a threat to sue under the patent law was brought in a state court. It was removed by the defendant with the claim that the suit arose under the patent law. Justice Holmes came to the conclusion that the suit was not itself a suit under the patent law. His analysis was as follows:

Holmes reasoned that what made the defendant's act wrong was its manifest tendency to injure the plaintiff's business. According to Holmes the alleged wrong would be the same by whatever the means by which it is accomplished. But whether it is wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state.

By paralleling Holmes' reasoning as a model to a quiet title action filed in Michigan a similar result would be reached. But first it is necessary to determine what the Michigan law regarding quiet title actions requires.

MCL §600.2932 provides in pertinent part:

> Sec. 2932.
> (1) Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

The filing of a quiet title action in Michigan is governed by Rule 3.411 of the Michigan Rules of Civil

Procedure. Rule 3.411 in pertinent part sets forth the necessary elements of a quiet title action as follows:

> (A) This rule applies to actions to determine interests in land under MCL 600.2932. It does not apply to summary proceedings to recover possession of premises under MCL 600.5701-600.5759.
>
> (B) Complaint.
> (1) The complaint must describe the land in question with reasonable certainty by stating
> (a) the section, township, and range of the premises;
> (b) the number of the block and lot of the premises; or
> (c) another description of the premises sufficiently clear so that the premises may be identified.
>
> (2) The complaint must allege
> (a) the interest the plaintiff claims in the premises;
> (b) the interest the defendant claims in the premises; and
> (c) the facts establishing the superiority of the plaintiff's claim.

It is clear that required elements of a quiet title in Michigan included the facts that created the cloud on the title. Thus, any involvement of federal law in this case does not create a quiet title action, but is merely a required element of facts.

Thus, through applying Justice Holmes' model, a similar conclusion is reached. What made the act (or failure

to act) of the IRS intentionally not complying with the mandatory personal service requirements of 26 U.S.C. §6335(a) was its tendency to cloud the title to the property. According Rule 3.411, it does not matter how the cloud was created, but rather that a cloud marred the title of the property. Whether there is a cloud on the title depends not on IRS law, but on the law of the state where the title was clouded.

Thus, the answer to the question, "Does this quiet title civil action arise under any Act of Congress providing for internal revenue?" is no.

Thus, the district court with the approval of the 6th Circuit improperly broadened the scope of 28 U.S.C. §1441(b).

E. Failure to Require the Federal District Court to Have Original Jurisdiction.

Rather than narrowly, interpreting the removal statute and denying jurisdiction, the 6th Circuit concluded that the answer to the 'arising under' jurisdictional question was yes. Accordingly, the next step in the line of reasoning that should be followed is:

If the answer is yes, then the question is, "Under what Act of Congress does the action arise?" A specific statute authorizing jurisdiction is needed to answer this question is required due to the phrase "any civil action of which the district courts have ***original jurisdiction*** ... ." Emphasis added. 28 U.S.C. §1447(c), also contains a statement requiring original jurisdiction. That statement says, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction the case shall be remanded."

A specific statute is required to show jurisdiction because federal courts have limited jurisdiction and can function only with the power authorized by Article III of the Constitution of the United States and the statutes passed by Congress in accordance with the Constitution. This Court in *Bender v. Williamsport Areas School District*, 475 U.S. 534, 89 L.Ed2d 501, 511, 106 S.Ct. 1326 (1986) conclusively restated this basic principle limiting the jurisdictional power of the federal courts.

Adhering to the basic principles of jurisdictional prudence is where the Sixth Circuit falters. Neither Darue nor the Sixth Circuit stated, nor can they state, what Act of Congress authorized the civil action of quiet title as between two private parties. This is because Congress has not passed an act allowing for the private resolution of a quiet title between two private citizens of the same state.

So, even after the 6th Circuit has issued its opinion, the question remains, "What right or immunity was created by what Act of Congress providing for revenue, or for that matter any Act of Congress, constitutes Grable's alleged cause of action founded in quiet title?" The question asked in from another perspective raises a disturbing answer. "By what authority did the district court quiet title?" As it will be seen, there was no authority for the district court to quiet title.

The 6th Circuit in its opinion held that because Grable's quiet title action was based on the faulty process in a tax sale the cause of action arose under federal law. Presumably this was a reference to 28 U.S.C. §1340, which was mentioned by the 6th Circuit in its introduction to the "Federal Question Jurisdiction" section of its opinion. What legal authority supported the 6th Circuit's conclusion is unstated. Furthermore, it is difficult to conjure such because the Supreme Court has never specifically addressed 28 U.S.C. §1340. Several lower courts have, however.

In *Young v. IRS*, 596 F.Supp. 141 (ND Ind. 1984), the district court stated, "The very language of the statute indicates that this section does not create jurisdiction in and of itself. Section 1340 makes it clear that the jurisdiction extends to civil actions arising under the Internal Revenue laws; as such, the suit must be based on some cause of action which the Internal Code recognizes and allows the plaintiff to bring. Absent some recognition of this kind of suit under the Internal Revenue Code, §1340 will not create an independent basis for jurisdiction. At least one court has recognized that jurisdictional statutes such as §1340 did not grant original jurisdiction, but simply waive certain jurisdiction requirements, see *Crown Cork & Seal Co. v. Pennsylvania Human Relations Comm.*, 463 F.Supp. 120, 127 n.8 (ED Pa. 1979).

The *Young*, court also stated, "If the plaintiff's claim comes outside the Code, then it logically cannot "arise under' the Code, and therefore §1340 cannot provide plaintiff with jurisdiction."

In this case Grable alleged a quiet title action under the laws of Michigan and outside of the Code. Indeed, there is no provision in the Code which recognized and allowed Grable to file a quiet title suit. The statute by which Congress specifically created causes of action for civil action are found in 26 U.S.C. §§7401 through 7434. There is no authorization found for a private right of quiet title in these sections. There is not to be found within these statutes any private right to relief, right of remedy or claim related to violations of section 6335(a). Neither Darue nor the 6th Circuit was able to cite such a provision. All the Sixth Circuit panel could do was conclude that Grable's complaint hinged on a violation of 26 U.S.C. §6335(a) and then jump to the conclusion that the alleged violation created an action arising under the laws of the United States. But a mere

violation of the law, even if it is the sole issue, is not enough to create a cause of action, see *Franchise Tax Board,* supra.

Neither 28 U.S.C. §1441(a), nor 28 U.S.C. §1340 are the applicable jurisdictional statutes in this case because Congress gave no jurisdictional authority for a quiet title action between two citizenship of the same state in federal courts. The only exceptions allowed for the district courts to address quiet title actions is that allowed by 28 U.S.C. §2409a and §2410. These two sections specifically waive the sovereign immunity of the United States in quiet title actions in which the United States claims an interest (§2409a), or, has or claims a mortgage or other lien (§2410). That neither of these two statutes is applicable in this case is was made perfectly clear in the response of the United States to Darue's third-party complaint in which the United States was named. The United States specifically stated that it neither claimed an interest in the property, nor did it have or claim a mortgage or other lien against the property. Had 28 U.S.C. §1441(a) been the proper statute then the Sixth Circuit would have had no choice but to remand because the federal courts have no original jurisdiction over quiet title actions between private citizens of a state.

Not only did the Sixth Circuit depart from the accepted rule of interpreting removal statutes narrowly, it also departed from the two requirements for removal regarding original jurisdiction in the district courts. The Supreme Court in *Syngenta,* supra, clearly defined these requirements. The Sixth Circuit, however, neither required original jurisdiction, nor asked the Darue to shoulder its burden of proving that the district court had original jurisdiction. Thus, in its attempt to broaden the scope of the removal statutes to cover the perceived substantial federal interest in revenue, the Sixth Circuit departed from the principle that removal statutes must be interpreted narrowly. Accordingly, this Court should carefully review and reverse

the Sixth Circuit's upholding of the denial of a remand where there was no original jurisdiction.

The bottom line is that the district court, with the Sixth Circuit Court's full approval, has made a decision to broaden the jurisdiction of the district court to quiet a state quiet title claim which it had no jurisdiction or authority to do, especially where the United States is not a party that claims or has an interest in the property. Without jurisdiction to quiet title on state property the district court's opinion is void and has no binding affect in any other court.

F. Failure to Require Defendant to Shoulder Burden of Proving Original Jurisdiction and Presence of Substantial Federal Question.

The granting of the Petition for the Writ of Certiorari brings to this Court issues regarding the prerequisites of both of an original jurisdiction and the presence of a substantial federal question before removal of a state cause of action to a federal district court. The initial requirement of original jurisdiction for removal has been has been addressed and said jurisdiction is found to be lacking. Two questions remain, "Did a substantial federal question exist so as to create federal jurisdiction?" and "Did the Defendant Darue shoulder its burden of proving the existence of such a substantial federal question?"

The answer to both questions is no. The Sixth Circuit, however, affirmed the district court's denial of a motion to remand when there was been no showing of a substantial federal question and no showing of the district court's original jurisdiction. As was discussed above, that decision to affirm has so far departed from the accepted and usual course of judicial proceedings and has sanctioned such

a departure by a district court as to call for an exercise of this Court's supervisory power.

But more importantly, the Sixth Circuit's decision to uphold a denial of a remand of a state cause of action where there is no substantial federal question or original federal jurisdiction conflicts with previous holdings of this Court.

In addition, the 6th Circuit's decision to allow a removal of a state cause of action without the district court having original jurisdiction over the cause of action is in direct conflict with numerous other circuits. It is also in conflict with its own recent decisions and with one of the cases it cited as authority for its alleged three-part synthesized test, i.e. the 7th Circuit case of *Seinfeld v. Austin*, 39 F.3d 761, 764 (7th Cir. 1994). *Seinfeld* requires a federal right of action as a prerequisite before a state case can be removed.

After laying the foundation for its incorrect rationale that jurisdiction of Grable's state quiet title action is founded on 28 U.S.C. §1340, the Sixth Circuit addressed the question of whether the quiet title claim as filed by Grable represented a cause of action 'arising under' the laws of the United States. The resolution of this question determines whether there is a substantial federal question to support a removal under 28 U.S.C. §1441(b). The same resolution will also determine whether there is original jurisdiction under section 1331.

The Sixth Circuit claims, "The long history of Supreme Court guidance concerning the meaning of 'arising under' the laws of the United States has been synthesized into a three part test," see Writ Petition App. A at 5. The court set forth its synthesized three part test:

> "..., a federal question may arise out of a state law case or controversy if the plaintiff asserts a federal right that 1) involves a substantial question of federal law; 2) is frame in terms of state law; and 3) requires interpretation of federal law to resolve the issue."

The Sixth Circuit cited three cases allegedly in support of the three part test: *Long v. Bando Manufacturing of America, Inc.*, 201 F.3d 754 (6th Cir. 2000); *Howery v. Allstate Insurance Co.*, 243 F.3d 912, 918 (5th Cir. 2001) and *Seinfeld v. Austin*, 39 F.3d 761 (7th Cir. 1994).

While the *Long* case and the *Howery* case appear to be consistent with each other and with the synthesized three part test as developed by the Sixth Circuit, they are contrary to the full test as developed by the Supreme Court. They are also contrary to the third case cited by the Sixth Circuit, *Seinfeld v. Austen*, and with numerous other cases, including some within the 6th Circuit.

The *Seinfeld* decision does not support just a three part test. Instead, the *Seinfeld* court adds a crucial element that must be present before a federal question can be considered a substantial federal question supporting a removal. The element the Sixth Circuit, the *Long* court and the *Howery* court neglected to apply is the Supreme Court requirement established through *Merrell Dow Parmaceuticals, Inc., v. Thompson*, 478 U.S. 804, 106 S.Ct. 3229, 92 L.Ed2d 650 (1986), that "if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question," *Seinfeld*, supra, 39 F.3d at 764. The *Seinfeld* court specifically adopted, "[a] deferral rule of decision is necessary but not sufficient for federal jurisdiction. There must also be a right of action to enforce to enforce that rule," *Seinfeld*, supra, 39 F.3d at 764.

The three part test the Sixth Circuit synthesized is not the complete test as developed by the Supreme Court because it omits the most crucial element of original jurisdiction in the district court. An analysis of several of this Court's decisions will clearly expose the fatal defect in the synthesized three part test.

This Court in *Franchise Tax Board*, supra, found that a state case could be removed if the complaint shows a cause of action arising under the Constitution or laws of the United States or it appears from the complaint that a substantial, disputed question of law that is essential element of the complaint. This Court also found, however, that merely the interpretation of a federal law, even if it is the only question to be decided, does not make it a federal question. Contrary to *Franchise Tax Board*, the Sixth Circuit decision sets the stage for any question or interpretation of a federal law to be considered a federal question and as such, sufficient as grounds for removal.

This Court in *Merrell Dow*, supra, 478 U.S. at 813, adopted the principle that a suit arises under the law that creates the cause of action. The holding in *Merrell Dow* was,

> "We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States."

The *Long* court, supra 201 F.3d at 759 analyzed the *Merrell Dow* decision and felt that it was unclear. The *Long* court felt that *Merrell Dow* still left an opening for federal

jurisdiction based on a substantial federal question of Interest, even though there was no express or implied federal cause of action. The court felt that if the substantial federal interest was framed in terms of state law and the interpretation was necessary for the resolution of the state claim then there would still be federal jurisdiction.

This is not the view that the *Seinfeld* court understood. The *Seinfeld* court, in adopting the *Merrell Dow* position stated, "Under *Merrell Dow*, therefore, 'if a federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a 'substantial' federal question,'" *Seinfeld*, supra, 39 F.3d at 764. Thus, the *Long* incorrectly interpreted *Merrell Dow*. It was the *Long* court's incorrect interpretation of *Merrell Dow* thatthe Sixth Circuit adopted to arrive at the conclusion that a simple substantial federal interest was enough to translate into a substantial federal question and district court original jurisdiction.

This Court in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523, 139 L.Ed2d 525 (1997) affirmed the requirement of original jurisdiction in the district court before a removal was proper. It stated, "The propriety of removal thus depends on whether the case originally could have been filed in federal court." The Court in *City of Chicago* also required a substantial federal question and explained what it meant, "A federal question exists when a right or immunity created by the Constitution or law of the United States is an element, and an essential one of the plaintiff's cause of action," *City of Chicago*, supra, 139 L.Ed2d at 535.

Numerous other cases have held that a state cause of action may include, and even require, the examination of federal law violations, but it will not create a substantial federal question sufficient to establish federal jurisdiction

unless there a federal private right of action was authorized by Congress.[2] For example, In *Smith v. Industrial Valley Title Insurance Co.*, 957 F.2d 90, 93-94 (3rd Cir. 1992), the court adopted the principles of *Merrell Dow* and found that a substantial federal question was not present in a state cause of action alleging a violation of 26 U.S.C. §6045(e)(3) because Congress, through the Internal Revenue Code, did not create a private federal cause of action.

Another example from another circuit is *Jairath v. Dyer*, 154 F3d 1280, 1281-82 (11th Cir. 1998). In that case a patient who tested HIV sued doctor for not operating on him in violation of the Americans with Disabilities Act (ADA) and state law. The 11th Circuit found that the ADA created the duty but federal court lacked subject matter jurisdiction. The court went on to note on page 1282 that,

> "federal-question jurisdiction may be based on a civil action alleging a violation of the Constitution, or asserting a federal cause of action established by a congressionally created

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[2] In addition to others already cited, the following are cases in other circuits that adhere to the requirement of a federal right of action to support federal question jurisdiction: *PCS 2000 LP v. Romulus Telecomms., Inc.*, 148 F.3d 32, 35 (1st Cir. 1998) ("unless a federal statute bestows a private right of action, courts aught to presume that Congress did not intend to confer federal jurisdiction'); *Zubi v. AT&T Corp.*, 219 F3d 220, 223, at n5 (3rd Cir. 2000); *Mulcahy v. Columbia Organic Chem. Co., Inc.*, 29 F.3d 148, 152 (4th Cir. 1994) ("Under *Merrell Dow*, if a federal law does not provide a private right of action, a state law action based on its violation does not raise a 'substantial' federal question"); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1168 (5th Cir. 1988) "*Merrell Dow* held that a private federal remedy was a necessary predicate to determining whether a presence of a federal element in a state-created cause of action resulted in that cause of action being one which arose under federal law'); and *Wander v. Kaus*, 304 F.3d 856, 859 (9th Cir. 2002).

> expressed or implied private remedy for violations of a federal statute," citing *City of Huntsville v. City of Madison*, 24 F.3d 169, 171 -172 (11th Cir. 1994)

Jairath and in *Merrell Dow* are similar to Grable's situation in that the violation of federal law was in fact a necessary element of the respective state law claims. The *Jairath* court acknowledged the statement in *Franchise Tax Board* that a federal question may arise if there is a vindication of a right under federal law if that right turned on some construction of federal law. But the *Jairath* court also noted that *Merrell Dow* stated the statement must be read with caution. *Jairath* court ultimately followed the correct holding of *Merrell Dow*. That holding was that a violation of federal law does not automatically create federal-question jurisdiction. *Jairath* then concluded that Congress had not created a private right of action (remedy) for a violation of federal law.

In addition, *Merrell Dow* 478 U.S. at 812 firmly sealed the Supreme Court's policy regarding the creation of a private remedy when none existed with,

> "[I]t would flout congressional intent to provide a private federal remedy for the violation of the federal statute. We think it would similarly flout, or at least under mine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a 'rebuttable presumption' or a 'proximate cause' under state law, rather than a federal action under federal law.

And continued on page 814,

> "Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. ... We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently ' substantial' to confer federal-question jurisdiction."

The *Jairath* case and Grable's case are parallel to the *Merrell Dow* case. In *Merrell Dow* no federal jurisdiction was found by the Supreme Court where a state law cause of action incorporated as an element of proof of the violation of a federal duty (i.e., not to misbrand). In *Jairath* , it was not to discriminate, while in Grable's case it the requirement to personally serve notice of seizure. But, in any event, in all three cases, there was no private cause of action with respect to the federal duty.

Even the 6th Circuit has recognized this principle in several cases.[3] In *Heydon v. MediaOne of Southeast Michigan, Inc.*, 327 F.3d 466, 471-72 (6th Cir. 2003) the 6th Circuit found that no federal question jurisdiction exists when

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[3] In the recent case of *Amsouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004) the 6th Circuit, contrary to its position in *Grable*, indicated that it correctly understood the *Merrell Dow's* requirement of a federally created right of action.

there is no private cause of action provided in the Cable Communications Policy Act by Congress.

Similarly, in *Board of Trustees of Painesville Township v. City of Painesville, Ohio*, 200 F3d 396, 399 (6th Cir. 1999) township and private owners brought action alleging a failure on the part of the city to provide them with wastewater treatment service in violation of Clean Water Act. 33 U.S.C. §1365 of the Clean Water Act was the sole source for the private litigant to seek to enforce portions of the Clean Water Act. The 6th Circuit found that the Clean Water Act did not provide a private right of action. In so holding it specifically stated, "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it," citing *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n.*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed2d 435 (1981).

Not only did the 6th Circuit in deviate from its own recognized principle of requiring a private right of action created by Congress its decision to find a substantial federal question in Grable's complaint, but it also violated it own mandate not to articulate federal interest issues.

One of the key factors in its decision to find a substantial federal question was the 6th Circuit's discussion relating to the merits of the government's interests with tax collections. "It is not the role of federal courts to articulate federal interest – but to enforce the federal interest identified by Congress, " *Painesville Township,* supra 200 F3d at 400, citing *Musson Theatrical Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1250 (6th Cir. 1996)[4]

[4] Another case that rejected the mere presence of federal interest was *Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231, 1236 (10th Cir. 2003) (Federal interest in a railroad right-away was not deemed sufficient to create a substantial federal question. A federal private right of action was required).

The question was asked earlier, "What right or immunity was created by what Act of Congress providing for revenue, or for that matter any Act of Congress, constitutes Grable's alleged cause of action founded in quiet title?" According to this Court in *City of Chicago* it is the appropriate question to ask. The answer, however, cannot be found in the Sixth Circuit decision.

IV. Conclusion

All of the Supreme Court cases cited above require a substantial federal question, i.e. a right that can be enforced in federal court. They all also implemented the well-pleaded complaint rule.

In the *Franchise Tax Board* case there was a federal question, but it was not deemed removable because it was not actionable in federal court. In *Merrell Dow* the mere violation of a federal labeling statute was deemed insufficient to create a substantial federal question. Perhaps *Beneficial National Bank v. Anderson*, 539 U.S. 1, 156 L.Ed2d 1, 123 S.Ct. ___ (2003) has indirectly, but completely, answered the ongoing issues of substantial question jurisdiction.

In *Beneficial* plaintiffs filed cause of action in state court alleging usury law violations under state law. Defendant removed to federal court on the grounds of a federally created right under section 85 and 86 of the National Bank Act. Supreme Court ruled that the sections created exclusive federal rights. The important aspect of the *Beneficial* case is not its holding, but in its strong dictum that

supported the holding. At *Beneficial*, supra 156 L.Ed2d, at 5 this Court stated,

> "As a general rule, absent diversity jurisdiction, a case is not removable if the complaint does not affirmatively allege a federal claim. Potential defenses, including a federal statute's pre-emptive effect, *Franchise Tax* ... do not provide a basis for removal. One exception to the general rule occurs when a federal statute completely pre-empts a cause of action."

In addition, 156 L.Ed2d at 7 this Court stated,

> "A civil action filed in a state court may be removed to a federal court if the claim is one 'arising under' federal law. §1441(b). To determine whether the claim arises under federal law, we examine the 'well-pleaded' allegations of the complaint and ignore potential defenses: 'a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or the Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. ... ***As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmative allege a federal claim.***" Emphasis added.

Thus, this Court's latest statement on substantial question jurisdiction and removal issues mandates that a

federal claim or right of action be alleged in the complaint before removal is proper.[5] Grable only alleged a violation of §6335(a). Congress has not provided a private right of action to enforce such a violation. Accordingly, there is in fact no substantial federal question involved in Grable's state quiet title and the case was improperly removed as the district court did not have original jurisdiction.

The 6th Circuit in deciding against Grable on the federal jurisdiction issue completely disregarded the well-pleaded complaint rule, created a legally unsupported test to determine original jurisdiction, and opted for the mere violation of a federal statute, as opposed to the generally accepted requirement of a federally created right of action, to create federal question jurisdiction. The decision of the 6th Circuit must be reversed with the case being remanded back to the district court with instructions to remand the case to the Michigan courts where the quiet title action belongs.

February 22, 2005

Respectfully submitted,

Charles E. McFarland
Counsel for the Petitioner
338 Jackson Road
New Castle, KY
(502) 845-2754

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[5] A case just decided on February 17, 2005, *Binder & Binder PC v. Barnhart*, 2005 U.S. App. LEXIS 2776 (2nd Cir. 2005) cited *Beneficial* as its authority in reaching its decision to remand for the determination of jurisdiction.

Appendix

28 U.S.C. §1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the removing party to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

Section 6335. Sale of seized property

(a) Notice of seizure

As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or

business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

28 U.S.C. §6339. Legal effect of certificate of sale of personal property and deed of real property

(b) Deed of real property

In the case of the sale of real property pursuant to section 6335 -

(1) Deed as evidence

The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) Deed as conveyance of title

If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

MCL §600.2932 Quieting title; interest of plaintiff; action by mortgagee; establishment of title; tenancy in common; actions.

Sec. 2932.

(1) Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest

inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

(2) No action may be maintained under subsection (1) by a mortgagee, his assigns, or representatives for recovery of the mortgaged premises, until the title to the mortgaged premises has become absolute, or by a person for the recovery of possession of premises, which were sold on land contracted, to whom relief is available under subdivision (1) of section 5634.

(3) If the plaintiff established his title to the lands, the defendant shall be ordered to release to the plaintiff all claims thereto. In an appropriate case the court may issue a writ of possession or restitution to the sheriff or other proper officer of any county in this state in which the premises recovered are situated.

(4) Any tenant or tenants in common who recovers any undivided interest in lands in an action under subsection (1) against a person or persons who may be in possession thereof, but who does not show in the trial of such action that he or they have any interest therein or title thereto, may take possession of the entire premises subject to all of the rights and interest of the other tenant or tenants in common therein.

(5) Actions under this section are equitable in nature.

MRCP, Rule 3.411 Civil Action to Determine Interests in Land

(A) This rule applies to actions to determine interests in land under MCL 600.2932. It does not apply to summary proceedings to recover possession of premises under MCL 600.5701-600.5759.

(B) Complaint.

(1) The complaint must describe the land in question with reasonable certainty by stating

(a) the section, township, and range of the premises;

(b) the number of the block and lot of the premises; or

(c) another description of the premises sufficiently clear so that the premises may be identified.

(2) The complaint must allege

(a) the interest the plaintiff claims in the premises;

(b) the interest the defendant claims in the premises; and

(c) the facts establishing the superiority of the plaintiff's claim.

(C) Written Evidence of Title to be Referred to in Pleadings.

(1) Written evidence of title may not be introduced at trial unless it has been sufficiently referred to in the pleadings in accordance with this rule.

(2) The plaintiff must attach to the complaint, and the defendant must attach to the answer, a statement of the title on which the pleader relies, showing from whom the title was obtained and the page and book where it appears of record.

(3) Within a reasonable time after demand for it, a party must furnish to the adverse party a copy of an unrecorded conveyance on which he or she relies or give a satisfactory reason for not doing so.

(4) References to title may be amended or made more specific in accordance with the general rules regarding amendments and motions for more definite statement.

(D) Findings As to Rights in and Title to Premises.

(1) After evidence has been taken, the court shall make findings determining the disputed rights in and title to the premises.

(2) If a party not in possession of the premises is found to have had a right to possession at the time the action was commenced, but that right expired before the trial, that party must prove the damages sustained because the premises were wrongfully withheld, and the court shall enter judgment in the amount proved.

Supreme Court, U.S.
FILED
MAR 28 2005
OFFICE OF THE CLERK

(9)

No. 04-603

IN THE

Supreme Court of the United States

GRABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,

Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING, INC.,
A Michigan corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

MICHAEL C. WALTON
Counsel of Record
JOHN M. LICHTENBERG
GREGORY G. TIMMER
MARY L. TABIN
ANTHONY A. PEARSON
MATTHEW B. VAN DYK
RHOADES MCKEE
600 Waters Building
161 Ottawa Avenue, N.W.
Grand Rapids, MI 49503
(616) 235-3500

COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

A District Court has original jurisdiction over civil actions pursuant to, *inter alia,* 28 U.S.C. §§ 1441 and 1331 (2004). This Court has long held that a District Court has subject matter jurisdiction over a case if the plaintiff's complaint establishes that the plaintiff's right to relief under a state law requires resolution of a substantial question of federal law in dispute between the parties.

In this case, Petitioner affirmatively and necessarily alleged in its Complaint that Petitioner's interest in certain property had not been effectively extinguished or effectively conveyed to Respondent because notice of the property's seizure by a federal agency was not served on Petitioner by that federal agency in a manner that adequately conformed with the federal requirements established in 26 U.S.C. § 6331 *et seq.* (2004).

The question presented is when Petitioner brings a state procedural cause of action requiring a determination of whether federal law requires a federal agency to strictly comply with certain federal notice requirements in order to effectively seize and convey Petitioner's property, or whether such seizure and conveyance is effective upon substantial compliance with the federal notice requirements, does Respondent have the right to remove such a cause of action to District Court?

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Darue Engineering & Manufacturing, Inc. states as follows:

1. All interested parties to this proceeding are identified in the caption.

2. There is no parent or publicly held company owning 10% or more of the stock of Darue Engineering & Manufacturing, Inc.

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ADDITIONAL STATUTORY PROVISIONS AT ISSUE

In addition to the statutory provisions noted by the Petitioner, the following constitutional provisions and federal statutes, the text of which is set out in the Appendix hereto, are involved also involved this matter: U.S. CONST. art. VI, cl. 2; U.S. CONST. amend. V; 26 U.S.C. § 6331 *et seq.*; and 26 U.S.C. § 7433.

STATEMENT OF THE CASE

A. Factual History

Prior to 1994, Petitioner, Grable & Sons Metal Products, Inc., failed to pay its corporate taxes to the Internal Revenue Service ("IRS") for at least six years.[1] As a result, the IRS recorded tax liens against certain property owned by Petitioner (the "Property"). The IRS then attempted to personally serve Petitioner a notice of seizure on the Property ("Notice of Seizure") because of the tax deficiency. Unable to personally serve Petitioner, the IRS sent the

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[1] The Petitioner's reluctance to meet its federal tax obligations has resulted in repeated unsuccessful encounters with the federal government in the federal courts. United States District Court Judge Gordon A. Quist held several hearings to determine whether the IRS could enter and seize property owned by Petitioner, including the real property at issue in this matter. Judge Quist ultimately determined that the United States could. In an effort to defeat Judge Quist's order, Petitioner filed a bankruptcy action in the United States Bankruptcy Court for the Western District of Michigan. That matter was dismissed as a bad faith filing by Judge James D. Gregg. The property was seized and sold in 1995. Thereafter, Petitioner filed three different actions relating to the government's seizure of Petitioner's property for unpaid taxes, each decided adversely to Petitioner by the District Court and each affirmed on appeal by the Sixth Circuit. *See Internal Revenue Service v. Grable & Sons Metal Products, Inc.*, No. 94-2426, 81 F.3d 160 (Table), 1996 WL 140352 (6th Cir. Mar. 27, 1996); *Grable & Sons Metal Products v. Twitchell*, No. 94-2461, 69 F.3d 537 (Table), 1995 WL 631566 (6th Cir. Oct. 26, 1995); *Grable & Sons Metal Products v. U.S.*, No. 94-1989, 59 F.3d 170 (Table), 1995 WL 367099 (6th Cir. Jun. 19, 1995).

Notice of Seizure by certified mail. Petitioner received the mailed Notice of Seizure and, thus, had actual knowledge that the IRS was seizing its Property. Thereafter, the IRS personally served Petitioner a Notice of the Sale of its Property ("Notice of Sale"), advertised the sale in the local newspaper, and posted the Notice of Sale at a local post office, courthouse, and IRS office. Petitioner brought no legal action challenging or seeking to enjoin the sale.[2]

On November 22, 1994, the IRS sold the Property in a tax sale to Respondent, Darue Engineering and Manufacturing, Inc. Although Petitioner could have redeemed the Property, it did not do so.[3] After the redemption period had lapsed, the IRS issued a deed to Respondent granting all Petitioner's rights, title and interest in the Property to Respondent as provided in Section 6339(b) of the Internal Revenue Code ("Code").[4] Next, the IRS filed

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[2] These facts were all admitted at the Rule 16 Scheduling Conference. Petitioner's counsel – consistent with prior admissions by his client – admitted that Petitioner had actually and timely received the mailed Notice of Seizure. The Tax Division Attorney, representing the IRS, admitted that the Notice of Seizure was not personally served. Petitioner incorrectly asserts in its Brief (pp. 8-9) that it was agreed that the IRS *made no effort* to personally serve the Notice of Seizure or to otherwise comply with 26 U.S.C. § 6335(a). To the contrary, at the Rule 16 Conference the Tax Division Attorney stated that an agent unsuccessfully attempted to personally serve Petitioner, and only thereafter caused notice to be sent by certified mail. There is also considerable testimony in a prior hearing before Judge Quist on the United States Marshal's attempts to serve Petitioner with an order for entry to seize assets. In any case, in light of the admissions by Petitioner of actual notice and by the IRS of the absence of personal service, the Court suggested – and the parties agreed – that the only material issue remaining in dispute was the legal standard of compliance under the federal law with respect to the notice provisions in order for the effective seizure of the Property and its effective conveyance to Respondent. The parties accordingly agreed to brief and argue those legal merits for a final decision by the Court.

[3] *See* 26 U.S.C. § 6337 (2004).

[4] 26 U.S.C. § 6339(b) (2004).

suit against Petitioner for the tax debt that remained unpaid after the sale of the Property. Although the Code affords taxpayers a cause of action against the IRS when, as Petitioner claims,[5] an IRS agent "recklessly or intentionally, or by reason of negligence" disregards any provision of the Code "in connection with any collection of federal tax,"[6] Petitioner did not pursue such a claim, either separately or as a counter-claim against the IRS. Instead, as before, Petitioner did nothing. Consequently, the District Court entered a default judgment in favor of the IRS and against Petitioner reducing the tax liabilities to judgment.

B. Procedural History

1. The Complaint

On December 14, 2000, Petitioner filed a complaint in the Circuit Court for the County of Eaton, State of Michigan. Styled as an action to quiet title, Petitioner alleged that it was "the owner in fee of certain property" and that "there is a cloud on title to said property based on a deed to Defendant Darue Eng. & Mfg, Inc."[7] The complaint further alleged that Respondent's claimed interest in the Property "is invalid because the interest from which it claims, to-wit the Deed . . . was given with improper notice pursuant to 26 U.S.C. § 6331, *et seq*."[8] Petitioner concluded

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[5] Petitioner's Brief On The Merits, p. i and 18-19.

[6] *See* 26 U.S.C. § 7433(a) (2004). The Internal Revenue Code, codified under Title 26, is carefully subdivided. Collection procedures are codified in Subtitle F (Procedure and Administration), Chapter 64 ("Collection") which includes within it Subchapter D ("Seizure of Property for Collection of Taxes"), encompassing Sections 6330 through 6344. Part I is entitled "Due Process for Collections," and Part II (being 26 U.S.C. § 6331 *et seq.*, referenced by Petitioner as the basis for relief in its Complaint) is entitled "Levy."

[7] Complaint to Quiet Title, filed in Circuit County for the County of Eaton, State of Michigan dated December 14, 2000; Brief in Opposition to Petition for Writ of Certiorari, App. 2, ¶¶ 4 and 6.

[8] *Id.* at ¶ 10.

"[t]hat since the tax deed was given pursuant to improper notice as required by 26 U.S.C. § 6335(a), said transfer and claim through the tax deed is null and void and void *ab initio*."[9] Petitioner requested that "Defendant be ordered to have no right, title or interest whatever in [illegible] to the above described premises or any part thereof and that Defendant be enjoined from interfering with the use of the property by Plaintiff, its heirs, and assigns."[10]

2. Proceedings In The District Court

On January 15, 2001, Respondent filed a Notice of Removal to the United States District Court for the Western District of Michigan.[11] On January 30, 2001, Petitioner filed a Motion to Remand, asserting that the Court lacked "original jurisdiction over the subject matter of the case."[12] Petitioner argued that its "Complaint sought to remove the cloud on Plaintiff's title based on a void deed the Defendant obtained from the District Director of the Internal Revenue Service,"[13] and once again anchored its argument upon the application, interpretation, and construction of various provisions of the Code.[14] On April 2, 2001, the United States District Court for the Western District of Michigan, Judge McKeague presiding, heard argument and denied Petitioner's Motion.[15]

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[9] *Id.* at ¶ 11.

[10] *Id.* at the Prayer for Relief.

[11] Notice of Removal of Action Under 28 U.S.C. § 1441(b) (Federal Question) dated January 15, 2001, ¶ 3; 6th Cir. Jt. App. Rec. No. 1.

[12] Plaintiff's Motion to Remand the Case and for Fees and Costs dated January 30, 2001; 6th Cir. Jt. App. Rec. No. 4.

[13] Plaintiff's Memorandum in Support of Motion to Remand the Case and for Fees and Costs dated January 30, 2001, p. 1; 6th Cir. Jt. App., Rec. No. 4.

[14] *Id.* at pp. 6-20.

[15] The District Court focused on whether the right to be vindicated by Petitioner's complaint "necessarily turns on some construction of federal law." Transcript of District Court Hearing on Petitioner's Motion

On April 13, 2001, Respondent interpleaded the United States into the case because the critical issue in determining the case pertained to the actions of the IRS.[16] Thereafter the parties agreed to brief and argue the merits of the case.[17] On March 28, 2002, the District Court entered a Judgment Order in favor of Respondent.[18]

3. Proceedings In The Court of Appeals

Petitioner appealed the District Court's Judgment Order to the Court of Appeals for the Sixth Circuit. That

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to Remand on April 2, 2001; Brief in Opposition to Petition for Writ of Certiorari, App. 1, p. 3. The Court recognized "that when you look at your complaint, particularly paragraphs 10 and 11, it appears as if the entire basis of the claim by [Petitioner] that [Respondent]'s deed is void is that the IRS . . . took title to this property . . . and then conveyed it in a tax sale to [Respondent], . . . [but] failed to strictly comply with the notice requirements of federal law." *Id.* at 4. The Court thus concluded that resolution of Petitioner's claim necessarily turned on "the proper construction of federal law." After rejecting Petitioner's analysis of this Court's decision in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986), the Court determined that the federal interests in the case were substantial because the construction of the pertinent provisions of the Code implicated the federal government's title and the ability of tax sale purchasers to rely on the title purchased.

[16] Third-Party Complaint by Defendant Darue Eng. & Mfg., Inc. against 3rd-Party Defendant United States dated April 13, 2001; 6th Cir. Jt. App. Rec. No. 12. As noted earlier, the underlying right which Petitioner's action seeks to vindicate is its right to notice prior to seizure of its property, and Congress has afforded taxpayers such as Petitioner with multiple opportunities – including a claim for damages against the IRS – to protect and vindicate that right. At bottom, although Petitioner brought this action against Respondent as the successor in interest to the IRS, this action turns upon (a) the factual question of whether a federal agency violated a federal statute and (b) the legal issue of whether federal law requires strict or substantial compliance before conferring unassailable title upon a bona fide purchaser for value. Both matters prompted Respondent's joinder of the IRS as a party.

[17] *Supra*, Note 2.

[18] District Court Judgment Order dated March 28, 2002; 6th Cir. Jt. App. Rec. No. 34.

Court considered whether the District Court (and, thus, the Court of Appeals) had proper subject matter jurisdiction.[19] Like the District Court below, the Court of Appeals noted that Petitioner's Complaint had expressly invoked federal law by alleging "that [Respondent]'s quitclaim deed was invalid because it 'was given with improper notice pursuant to 26 U.S.C. § 6331 *et seq.* . . .'"[20] The Court also found the federal interest in the question presented to be substantial:

> The federal government cannot function without effective tax collection. . . . Society has a strong interest in clear rules for handling delinquent taxpayers. The IRS must have transparent procedures for seizing and selling property so that people will be willing to purchase property at tax sales, allowing the IRS to provide a predictable stream of tax revenue. Determining the scope of the IRS's authority to seize property to satisfy a tax debt undoubtedly implicates a substantial federal interest.[21]

The Court of Appeals concluded that Petitioner's complaint necessarily required resolution of a substantial federal question as part of its chosen state-law form of action,[22] upheld the District Court on the merits, and affirmed its Judgment Order. Petitioner then petitioned this Court for a Writ of Certiorari, which was granted "limited to Question 1 presented by the petition."[23]

[19] *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 377 F.3d 592, 594-96 (6th Cir. 2004).

[20] *Id.*

[21] *Id.* at 596 (citing *United States v. Kimbell Foods*, 440 U.S. 715, 734 (1979) (citing *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819))).

[22] *Id.*

SUMMARY OF ARGUMENT

Pursuant to 28 U.S.C. §§ 1331 and 1441, the District Courts have original jurisdiction and, consequently, removal jurisdiction, over all cases "arising under" the Constitution, laws, or treaties of the United States.[24] This Court has developed a two-step analytical process for determining the existence of federal-question jurisdiction: (1) application of the well-pleaded complaint rule; and (2) application of a dual "arising under" analysis.

The well-pleaded complaint rule asks whether the plaintiff's complaint, as *well-* or *properly*-pleaded, necessarily presents, as an essential element of the claim, a question of federal law.[25] Petitioner here expressly and necessarily invoked provisions of federal law (the Code) in its complaint.[26] Under the Michigan law chosen by Petitioner as the procedural vehicle for its claim and this Court's decision in *Hopkins v. Walker*,[27] Petitioner was *required* to plead and establish in its favor the federal issues and questions found on the face of Petitioner's *well*-pleaded complaint. The federal question was, thus, part of the well-pleaded complaint.

The dual "arising under" jurisdictional analysis – harmonizing Justice Holmes' rule from *American Well*

[23] *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, __ U.S. __, 125 S. Ct. 824 (2005).

[24] *See* 26 U.S.C. §§ 1331 and 1441 (2004).

[25] *See Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152 (1908); and *Gully v. First National Bank*, 299 U.S. 109, 112-13 (1936).

[26] 26 U.S.C. § 6331, *et seq.* (2004).

[27] *See* MICH. COMP. LAWS § 600.2932 (2004); MICH. CT. R. 3.411 (2004); and *Hopkins v. Walker*, 244 U.S. 486 (1917).

Works v. Layne & Bowler Co.[28] with the rule set forth in *Smith v. Kansas City Title & Trust Co.*[29] – was described in *Gully v. First National Bank in Meridian*[30] and more recently synthesized in *Franchise Tax Board v. Construction Laborers Vacation Trust*:[31] Federal-question jurisdiction exists under that analysis if the "well-pleaded complaint establishes either [(1)] that federal law creates the cause of action or [(2)] that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[32]

Under the second of these dual jurisdictional avenues, the focus is on whether Petitioner's "right to relief necessarily depends on resolution of a substantial question of federal law."[33] The answer to that question turns on whether "[(1)] it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or [(2)] that . . . the . . . claim is 'really' one of federal law."[34] From *Gully* and subsequent decisions of this Court, a three-part test has been developed to determine whether a case based on a state-law cause of action nevertheless presents a federal question sufficient to justify the exercise of federal jurisdiction. First, the resolution of the federal question must be outcome determinative to the

[28] 241 U.S. 257, 260 (1916) ("a suit arises under the law that creates the cause of action").

[29] 255 U.S. 180, 199 (1921) (holding that federal-question jurisdiction is appropriate if the plaintiff's "right to relief depends upon the construction or application of the Constitution or laws of the United States").

[30] 299 U.S. 109 (1936).

[31] 463 U.S. 1 (1983). *See also Merrell Dow*, *supra*, at 807, n. 2; *Christianson v. Colt Industries Operating Co.*, 486 U.S. 800, 808 (1988); and *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997).

[32] *Franchise Tax Board*, *supra*, at 27-28.

[33] *Id.*

[34] *Id.* at 13.

case. Second, the federal question must actually be in dispute between the parties. Third, the federal question must implicate a substantial federal interest.

Petitioner's claim satisfies each of these three criteria: (1) It presents a federal question that will determine, the outcome of the case. If the IRS was required to strictly comply with the notice provisions of 26 U.S.C. § 6335 in order to effectively seize Petitioner's property interest and convey good title to Respondent, Petitioner will prevail; but if "substantial compliance" by the IRS was sufficient to confer on Respondent the interest previously held by Petitioner (per 26 U.S.C. § 6339), then Respondent will prevail. (2) This question is in dispute; indeed, it is the only legal dispute between the parties, and is one that appears on the face and at the core of Petitioner's complaint. (3) The federal question to be resolved is "substantial" in that its resolution will necessarily impact the balance Congress has struck in 26 U.S.C. § 6331 *et seq.* between the constitutional interests of notice and due process of the delinquent taxpayer, the interest in enforceable and effective tax collection and revenue generation of the federal government, and the property interest of tax sale buyers. Therefore, the "arising under" jurisdictional analysis of *Smith*, *Gully*, and *Franchise Tax Board* is satisfied and federal jurisdiction is appropriate.

Petitioner, however, mistakenly suggests that this Court's decision in *Merrell Dow* over-ruled and displaced the *Smith/Gully/Franchise Tax Board* jurisdictional analysis by holding that federal-question jurisdiction can only exist if Congress has created a private right of action to enforce or vindicate the federal right at issue. To the contrary, *Merrell Dow* is both in harmony with this line of cases and distinguishable from the instant case. *Merrell Dow* stands for the proposition that in cases (such as that one) where the federal question is at best "collateral" (per *Gully*) to the

plaintiff's state-law claim, the absence of a private right of action provided by Congress to enforce the underlying federal standard is strong (and perhaps conclusive) evidence that the federal question presented is not substantial under a *Smith/Gully/Franchise Tax Board* analysis. *Merrell Dow* does not preclude a finding of federal-question jurisdiction in other *Smith*-type cases where (as here) the federal question provides the substantive source of the plaintiff's claim, even in the absence of a congressionally-created private right of action.

Petitioner's treatment of *Merrell Dow* is at odds with this Court's reaffirmation of the *Smith/Gully/Franchise Tax Board* analysis in two subsequent cases: *Christianson v. Colt Industries Operating Corp.*[35] and *City of Chicago v. Int'l. College of Surgeons.*[36] However, even if *Merrell Dow* is construed as Petitioner claims it should be, the instant case satisfies the jurisdictional test Petitioner would impose. Congress has provided an express cause of action to vindicate taxpayers' notice rights under the Code through an action against the IRS.[37] While Petitioner was not obliged to pursue that remedy, the fact of its existence is evidence of Congress' understanding that the federal interests at issue are substantial. Furthermore, the historic relationship between 28 U.S.C. §§ 1331 and 1340 further evidences Congress' understanding of the substantiality of the federal interests underlying the federal question presented by Petitioner's complaint. In sum, under any reading of *Merrell Dow*, federal-question jurisdiction exists in this case.

LEGAL ARGUMENT

At its core, this case involves the substantial federal question of whether federal law (the Code) requires a federal

[35] 486 U.S. 800 (1988).
[36] 522 U.S. 156 (1997).
[37] 26 U.S.C. § 7433 (2004).

agency (the IRS) to strictly comply with certain federal notice requirements in order to effectively seize and convey Petitioner's property, or whether under federal law such seizure and conveyance is effective upon substantial compliance with the federal notice requirements. A careful and thoughtful review of the complaint and this Court's long-standing interpretation of the congressional grant of jurisdiction to the lower federal courts discloses that this case was appropriately removed to the District Court.

A. Initial Development Of Federal Question Jurisdiction

The current authority of the lower federal courts to hear "federal question" cases was not granted by Congress until the predecessor to modern day 28 U.S.C. § 1331 was enacted in the Act of March 3, 1875.[38] Although the language of the statutory and constitutional grants of jurisdiction are virtually identical, this Court has since recognized that the scope of § 1331 original jurisdiction is not as broad as that of Article III.[39] The Court has tied removal jurisdiction to a determination of whether the federal court would have original jurisdiction.[40]

[38] Chapter 137, § 1, 18 Stat. 470. *See* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717, 720 (1986) ("Except for the short lived Judiciary Act of 1801, Congress did not vest general federal-question jurisdiction in the lower federal courts until 1875.").
[39] U.S. CONST. art. III, § 2, cl. 1. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 494-95 (1983), and *Franchise Tax Board, supra*, at 8, n. 8.
[40] *See Tennessee v. Union & Planters' Bank*, 152 U.S. 454 (1894) (Harlan, J., dissenting) ("the court now holds that . . . to remove . . . [a case] from the state court . . . depend[s] upon the inquiry whether the suit was one in respect of which the original jurisdiction of the circuit court could be invoked by the plaintiff"). *See also City of Chicago, supra.*

While "[t]he jurisdiction structure at issue in this case has remained basically unchanged for the past century,"[41] it has nonetheless spawned a profusion of decisional authority that commentators have occasionally struggled to synthesize and harmonize.

> Since the first version of § 1331 was enacted . . . the statutory phrase "arising under the Constitution, laws, or treaties of the United States" has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts. Especially when considered in light of § 1441's removal jurisdiction, the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.[42]

Petitioner posits that this Court in *Merrell Dow* at last untied this Gordian knot, making the present case susceptible to easy resolution (as well as immediate remand to state court) through the application of a jurisdictional litmus test based upon the presence or absence of a congressionally-created private right of action. Respondent respectfully disagrees and believes, as discussed *infra*, that *Merrell Dow* was simply a further refinement of this Court's definition of the outer limits of federal-question jurisdiction.[43]

[41] *Franchise Tax Board, supra,* at 7.

[42] *Id.* at 8.

[43] As also discussed, *infra*, even applying Petitioner's proposed litmus test, federal-question jurisdiction exists in this matter.

B. The Well-Pleaded Complaint Rule

1. Development Of The Rule

The starting point for every analysis of whether federal-question jurisdiction exists is the plaintiff's complaint. That pleading is to be evaluated, for jurisdictional purposes, under the "well-pleaded complaint" rule – a rule most famously articulated by this Court in *Louisville & Nashville Railroad Co. v. Mottley.*[44] This rule was restated six years later in *Taylor v. Anderson,*[45] and has been treated as the starting point for this Court's analysis of these questions in every case since:

> It has become firmly settled that whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute . . ., must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose.[46]

The general parameters of the rule sound deceptively simple. The focus is solely on Plaintiff's claim.[47] The Court does not look at any defenses asserted (or anticipated to be

[44] 211 U.S. 149, 152 (1908). *See also Franchise Tax Board, supra,* at 9-10.

[45] 234 U.S. 74 (1914).

[46] *Id.* at 75-76. The phrase *"necessarily appears,"* as used by the Court, not only forecloses a plaintiff's unnecessary inclusion of allegations rebutting anticipated federal defenses, but also the inappropriate exclusion of federal issues essential to the cause of action asserted. As discussed later, Petitioner's explicit invocation of the Code was an essential element of its cause of action, not merely a rebuttal of an anticipatory defense.

[47] *See id.*

asserted) by the defendant.[48] However, the Court does not merely look to the complaint as actually drafted by the plaintiff, but rather to that complaint which, in an idealized sense, pleads just enough to have satisfied the rules for pleading the relevant claim – hence, the adjectives "well-pleaded" or "properly-pleaded."[49] "The presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's *properly pleaded* complaint."[50] Further, although "[t]he rule makes the plaintiff the master of the claim[, and although] he or she may avoid federal

[48] *See* 14B Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 3D, § 3722, n. 20 (1998 & Supp. 2004); and *Franchise Tax Board, supra*, at 10.

[49] This subtlety is evidenced by the Court's use of the "artfully pleaded complaint" doctrine as a corollary rule in some cases. The "artfully pleaded complaint" doctrine holds that plaintiff cannot foreclose the defendant's right to remove by artfully omitting the federal issue in its complaint. 14B Wright, Miller & Cooper, FEDERAL PRACTICE & PROCEDURE: JURISDICTION 3D, § 3722 (1998 & Supp. 2004).

[50] *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987) (citing *Gully, supra*, at 112-13). *See also Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 474 (1998); and *Christianson, supra*, at 809, n. 3 (applying the well-pleaded complaint analysis to a 28 U.S.C. § 1338(a) question). *Christianson* also indicates that Petitioner's argument that it avoided federal jurisdiction by failing to singularly plead 26 U.S.C. § 6339(b) (despite having plead "26 U.S.C. § 6331 *et seq.*") is without merit. Putting aside for the moment that such a singular reference was not required to present a federal question (*see* Note 60, *infra*), the artful omission from the complaint of necessary federal law does not avoid federal-question jurisdiction. *Christianson, supra*, at 809, n. 3 (citing *Franchise Tax Board, supra*, at 22; and *Federated Department Stores v. Moitie*, 452 U.S. 394, 396, n. 2 (1981)) ("On the other hand, merely because a claim makes no reference to federal . . . law does not necessarily mean the claim does not 'arise under' [federal] law. Just as 'a plaintiff may not defeat removal by omitting to plead necessary federal questions in a complaint,' . . . so a plaintiff may not defeat . . . jurisdiction by omitting to plead necessary federal . . . questions.").

jurisdiction by exclusive reliance on state law,"[51] what is meant by "master of the claim" is only that the plaintiff is master to decide what law his claim is based upon, not master to choose to keep the case in state court.[52] Although Petitioner's form of action in this case is a creature of state law, its substantive claim rests entirely on federal law.

2. Applying The Well-Pleaded Complaint Rule

The critical question in conducting the well-pleaded complaint rule analysis is whether, as Justice Cardozo observed in *Gully*, "a right or immunity created by the Constitution or laws of the United States [is] an element, and an essential one, of the plaintiff's cause of action."[53] Here, Petitioner's allegations of the various federal law questions are essential elements of its claim to invalidate the deed issued by the IRS to Respondent under the Code.[54]

[51] *Id.*

[52] *City of Chicago, supra*, at 164 (citing *Caterpillar Inc., supra*, at 398-99) ("Accordingly ICS errs in relying on the established principle that a plaintiff, as master of the complaint can 'choose to have the cause heard in state court.' . . . By raising several claims that arise under federal law, ICS subjected itself to the possibility that the City would remove the case to the federal courts.").

[53] *Gully, supra*, at 112 (citing *Starin v. New York*, 115 U.S. 248 (1885); and *First National Bank v. Williams*, 252 U.S. 504 (1920)).

[54] As Petitioner acknowledges (*See* Petitioner's Brief on the Merits, pp. 17-18), its suit was brought under Michigan's "Action to Determine Interests in Land" statute. MICH. COMP. LAWS § 600.2932. This statute is part of Michigan's Revised Judicature Act, the provisions of which are procedural, not substantive in nature. *See Connelly v. Paul Ruddy's Equipment Repair & Service Co.*, 388 Mich. 146, 151, 200 N.W.2d 70, 72 (1972) ("The purpose of the [Revised Judicature Act] was to effect procedural improvements, not advance social, industrial or commercial policy in substantive areas."). The statute under which Petitioner brings its Complaint is an equitable statute, and its claim is not in the nature of an action at law for ejectment, but in equity to determine the appropriate titles, interests, and rights of the parties to real property. *See* MICH. COMP. LAWS § 600.2932(1) ("Any person, whether he is in possession of

Petitioner's complaint alleges on its face the federal question presented by this case. It states that Petitioner was "the owner in fee of certain property" and that "there is a cloud on title to said property based on a deed to Defendant Darue Eng. & Mfg, Inc."[55] Petitioner's complaint further alleges that Respondent's claimed interest in the Property "is invalid because the interest from which it claims, to-wit the Deed . . . was given with improper notice pursuant to 26 U.S.C. 6331, *et seq.*,"[56] and therefore was "null and void and void *ab initio*."[57] Importantly, Petitioner requests that "Defendant be ordered ***to have*** no right, title or interest whatever in or to the above described premises or any part thereof and that Defendant ***be enjoined*** from interfering with the use of the property by Plaintiff, its heirs, and assigns."[58] Petitioner, thus, does not merely seek to have a declaration as to what happened in the past, but a prospective judgment removing the alleged cloud of title, enjoining the exercise of rights purportedly granted in the deed from the IRS and determining that Respondent has no future or on-going right, title or interest in the Property. Petitioner has, in fact, expressly pleaded the federal question.

Moreover, pleading the infirmity of Respondent's deed – which required the express invocation of the federal statute (26 U.S.C. § 6331 *et seq.*) and introduction of the federal question – is an essential element of Petitioner's

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the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not."); and MICH. COMP. LAWS § 600.2932(5) ("Actions under this section are equitable in nature.").

[55] Complaint to Quiet Title, filed in Circuit County for the County of Eaton, State of Michigan dated December 14, 2002; Brief in Opposition to Petition for Writ of Certiorari, App. 2, ¶¶ 4 and 6.

[56] *Id.* at ¶ 10.

[57] *Id.* at ¶ 11.

[58] *Id.* at Prayer for Relief (emphasis added).

properly pleaded claim for relief.[59] It is not merely collateral or incidental to the claim, nor is it alleged in anticipation of a defense.[60] As Petitioner acknowledges, its state-law claim fell within and was required to be pleaded in accordance with the Michigan Court Rule governing a "Civil Action To Determine Interests In Land."[61] Under that Court Rule, Petitioner's complaint must allege (among other things) "the interest the defendant claims in the premises; and the facts establishing the superiority of the plaintiff's claim."[62] Thus, the Michigan law under which Petitioner brings its claim *requires* as essential elements of that claim the allegations (1) that Respondent received title from the IRS pursuant to its seizure under the Code, and (2) (to demonstrate Petitioner's allegedly superior interest) that the IRS' seizure of the property and subsequent transfer to Respondent was "null and void and void *ab initio*" because of the allegedly deficient notice under the Code.

Thus, a plain language reading of Petitioner's complaint and an examination of the pleading requirements of the applicable state law demonstrate that the federal issues were, in fact, necessarily plead by Petitioner as express and essential elements of its claim. The essential "federal question" presented by Petitioner's well-pleaded complaint,

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[59] On this point there is no dispute: "It is clear that required elements of a quiet title in Michigan included the facts that created the cloud on the title." Petitioner's Brief on the Merits, p. 18.

[60] *Id.* Petitioner's argument that 26 U.S.C. § 6339 was interjected only through Respondent's defense ignores that it is contained within the part of the Code that *Petitioner* referenced and incorporated in its complaint as the basis of its claim. Petitioner's argument further ignores that its admitted reliance upon 26 U.S.C. § 6335 to contest Respondent's claim of title from the IRS by itself presents a federal question, such that explicit reference to 26 U.S.C. § 6339 merely frames the scope and source of Respondent's acknowledged claim of title.

[61] MICH. CT. R. 3.411. *See also* Petitioner's Brief on the Merits, pp. 17-18.

[62] MICH. CT. R. 3.411(B)(2).

so understood, was whether strict compliance with the notice requirements of 26 U.S.C. § 6335 was required in order for Respondent to have good title, or whether the substantial compliance provided by 26 U.S.C. § 6339 was sufficient to secure Respondent's title. As discussed *infra,* the answer to this purely legal question is outcome determinative of Petitioner's claim, is in dispute between the parties, and implicates several substantial federal interests, and therefore, presents a substantial federal question. Under this Court's long-established standards of federal-question jurisdiction, this was enough to support removal to the District Court.

3. This Application Of The Well-Pleaded Complaint Rule Is Supported By Supreme Court Precedent

This Court's decision in *Hopkins v. Walker*[63] recognized the existence of federal-question jurisdiction on a complaint closely analogous to Petitioner's. The plaintiff in *Hopkins* brought a claim to clear its title to real property acquired by its predecessors in interest through a mining claim for which a federal patent had issued. The defendants claimed to have made lode locations on the property and recorded certificates in the county where the property was located. The plaintiff's complaint asserted that the certificates were recorded under a mistaken interpretation of federal mining law and, as a result, were invalid and clouds upon the title.[64] Original jurisdiction was founded on the fact that determination of the plaintiffs' rights required a construction of the mining laws under which the proceedings resulting in the patent were had, a decision of what, according to those laws, passed by the patent, and what, if

[63] 244 U.S. 486 (1917).

[64] *Id.* at 487-88.

anything, was excepted and remained open to location by others.[65]

Relying upon the well-pleaded complaint rule, this Court held that "where an appropriate statement of the plaintiff's cause of action, unaided by any anticipation or avoidance of defenses, discloses that it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of a law of Congress"[66] it "arises under" federal law. The Court rejected the argument that "the allegations concerning the existence, invalidity, and recording of the defendants' certificates of location form no part of the plaintiffs' cause of action, and so, for present purposes, must be disregarded:"[67]

> In both form and substance the bill is one to remove a particular cloud from the plaintiffs' title,--as much so as if the purpose were to have a tax deed, a lease, or a mortgage adjudged invalid and canceled. It hardly requires statement that in such cases the facts showing the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff's cause of action. Full recognition of this is found in the decisions of this and other courts.[68]

[65] *Id.* at 489.

[66] *Id.* (The Court also noted that "it is plain that a controversy respecting the construction and effect of the mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the district court.").

[67] *Id.* at 490.

[68] *Id.* (citing, *inter alia, Wilson Cypress Co. v. Del Pozo y Marcos,* 236 U. S. 635, 643 (1915); and *Lancaster v. Kathleen Oil Co.*, 241 U. S. 551, 554 (1916)).

Thus, this Court concluded, the allegations raising the issue of federal law – even though pertaining to the quality of and rights associated with the defendants' title – "are important elements of the asserted right to have the recording of the certificates canceled as a cloud upon the title."[69] Resolution of the case depended on the validity of those certificates under federal law. "We are accordingly of opinion that the bill states a case arising under the mining laws of the United States, and of which the District Court is given jurisdiction."[70]

As in *Hopkins*, Petitioner's complaint alleges that Respondent had recorded an instrument purporting to state a claim of title to the same Property to which Petitioner alleges it has title. As in *Hopkins*, the form of the action and the relief sought is in the nature of removing Respondent's alleged cloud on title and adjudging from that point forward that Respondent has no right, title, or interest in the Property. And, as in *Hopkins*, the validity of the purported cloud can be determined solely by construction and application of federal law – namely, the notice provisions of 26 U.S.C. § 6331 *et seq.*, as specifically pleaded by Petitioner. The facts showing Petitioner's title and the existence and invalidity of Respondent's deed are essential parts of the Petitioner's cause of action because Michigan's statute and applicable court rule expressly require Petitioner to plead these facts and issues.[71] Thus, construction and application of the Internal Revenue Code "are important elements of the

[69] *Id.* at 490-91.

[70] *Id.* at 491.

[71] Petitioner's argument that 26 U.S.C. § 6339 is a "federal defense" interjected by Respondent is further undercut when considered in light of the fact that 26 U.S.C. § 6339 creates and defines the nature and scope of Respondent's title which, under both the Michigan statutes governing Petitioner's form of action and *Hopkins*, Petitioner was required to "plead around" as an "essential element" of its well-pleaded complaint. *See also*, Notes 50 and 60, *supra*.

asserted right to have the [deed] canceled as a cloud upon the title."[72] Indeed, they are essential to Petitioner's cause of action.[73]

Respondent respectfully submits that *Hopkins*, if still good law, is dispositive. The question is whether subsequent developments in this Court's federal-question jurisprudence are such that if *Hopkins* were decided today, a different outcome would result. Respondent believes, as this Court asserted in 1983, that "[t]he jurisdiction structure at issue in this case has remained basically unchanged for the past century."[74] All that has followed is the continued application of that structure to a number of discreet fact situations, none of which would change the outcome of *Hopkins* or, by extension, should impact the outcome of this case. Petitioner's argument, in contrast, would compel the conclusion that the Court has already *sub silentio* overruled *Smith*, *Gully*, and a number of other more doctrinally-central cases, as well as *Hopkins*. Respondent does not believe the Court has adopted the surreptitious jurisprudence advanced by Petitioner.

[72] *Hopkins*, *supra*, at 490-91.

[73] In this respect, *Hopkins* and the present matter stand in sharp contrast to cases where the plaintiff merely sought to eject the defendant from property to which the plaintiff asserted a right or title. In those cases, the Court has consistently found no federal question presented by federal issues associated with the defendant's title because the allegations as to the defects of the defendant's title were merely anticipatory of a defense under that old form of action at law. *See, e.g., Joy v. City of St. Louis*, 201 U.S. 332 (1906); *Lancaster*, *supra*, at 554-55; and *Taylor*, *supra*, at 75 ("[H]owever essential or appropriate these allegations [that the defendants were asserting ownership under a deed that was void under the congressional legislation restricting the alienation of lands allotted to the Choctaw and Chickasaw Indians] might have been in a bill in equity to cancel or annul the deed, they were neither essential nor appropriate in a petition in ejectment.").

[74] *Franchise Tax Board*, *supra*, at 7.

C. "Arising Under," The "Substantial" Federal Question Test And The Proper Role of *Merrell Dow*

1. The Development Of The "Arising Under" Standard Of Federal Question Jurisdiction

The "well-pleaded complaint" rule defines the object of the Court's federal-question jurisdictional analysis. As shown, Petitioner's complaint in this case necessarily invoked and incorporated the notice provisions of 26 U.S.C. § 6331 *et seq.* Petitioner, however, maintains that still its claim does not "arise under" federal law. A review of this Court's development of the "arising under" standard discloses Petitioner is wrong.

Justice Holmes' oft-quoted rule that "a suit arises under the law that creates the cause of action" was first uttered in the majority opinion he authored in *American Well Works v. Layne & Bowler Co.*,[75] wherein the defendant had interfered with the plaintiff's business by making threats to sue both the plaintiff and the plaintiff's buyers over the sale and use of plaintiff's pump, basing its threats upon allegations that the plaintiff's pump infringed on certain patents held by the defendant.[76] The plaintiff sued in state court seeking damages, alleging the defendant's claims of patent infringement were untrue.[77] The defendant removed the matter to federal court.[78] This Court determined that the plaintiff's claim was based upon the defendant's conduct, not upon the extent to which the that conduct was justified, and thus, could be stated without regard to the existence or validity of the patents claimed by the defendant.[79] The question of whether the defendant's conduct was "wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state."[80] Inasmuch as the plaintiff's claim could be fully and adequately stated without reference to federal law, it was deemed to arise under state law, leaving the federal court without jurisdiction.

The rule as articulated by Justice Holmes has been interpreted to support the rather common sense proposition that if the plaintiff's well-pleaded complaint establishes that his cause of action was created by federal law, then the Court should have jurisdiction. As was noted later in both *Franchise Tax Board* and *Merrell Dow*, however, it is better viewed as a rule of inclusion, not of exclusion;[81] and it does not address the situation where a plaintiff's cause of action is created by state law, but plaintiff's right to relief necessarily depends on the resolution of a substantial question of federal law. The Court addressed that situation five years later in *Smith v. Kansas City Title & Trust Co.*[82]

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[75] 241 U.S. 257, 260 (1916).
[76] *Id.*
[77] *Id.* at 258-59.
[78] *Id.* at 258.

[79] *Id.* at 259 (The essence of the plaintiff's complaint focused on the defendant's conduct and the effect of that conduct; thus, it was "enough to allege and prove the conduct and effect, leaving the defendant to justify if he can. . . . [b]ut all such justifications are defenses, and raise issues that are no part of the plaintiff's case."). In this respect, Justice Holmes' opinion can actually be seen as a particular application of the well-pleaded complaint rule previously discussed. The federal issue, though pleaded by the plaintiff as part of its complaint, was an anticipatory defense, not a *required* element of the actual claim.
[80] *Id.* at 260.
[81] *See Franchise Tax Board, supra*, at 8-9; *Merrell Dow, supra*, at 809, n. 5 (citing *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2nd Cir. 1964) (Friendly, J.) ("It has come to be realized that Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended.")).
[82] 255 U.S. 180 (1921).

In *Smith*, a shareholder of the defendant corporation brought a derivative action to enjoin the corporation from purchasing certain bonds which were to be issued under the authority of the Federal Farm Loan Act, which, in turn, the plaintiff shareholder challenged as unconstitutional.[83] Thus, the plaintiff was seeking a state-created remedy – an injunction – and his cause of action was properly categorized as a state cause of action; but his right to that remedy turned upon the determination of whether the Federal Farm Loan Act was constitutional.[84] In reaching its conclusion, the Court reaffirmed the well-pleaded complaint rule but noted that the focus is properly on whether the plaintiff's right to relief turns on an interpretation of federal law:

> The general rule is that, where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction under this provision.[85]

Justice Holmes' dissent in *Smith* makes clear the import and significance of the Court's decision in that case:

> This suit was brought by a citizen of Missouri against a Missouri corporation. . . . and the right claimed is that of a stockholder to prevent the directors from doing an act . . . alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. . . .

[83] *Id.* at 195-96.

[84] *Id.* at 199 ("The attack upon the proposed investment in the bonds described is because of the alleged unconstitutionality of the acts of Congress. . . .").

[85] *Id.*

> [T]his seems to me to make manifest . . . that, the cause of action arises wholly under Missouri law.[86]

Despite Justice Holmes' observations, the majority found there to be jurisdiction because, although the plaintiff's cause of action arose wholly under Missouri law, his right to relief turned on a construction of federal law.

While Justice Holmes found this outcome repugnant to his singular rule that "a suit arises under the law that creates the cause of action,"[87] this Court's subsequent treatment of the *American Well Works* rule as a rule of inclusion, but not of exclusion,[88] harmonized the results of *American Well Works* and *Smith* into the test which exists today. This Court's discussion in *Franchise Tax Board v. Construction Laborers Vacation Trust*[89] reflects that synthesis of the *Smith* and *American Well Works* rules. After noting that "a welter of issues regarding the interrelation of federal and state authority and proper management of the federal judicial system"[90] surrounds federal-question jurisdiction, Justice Brennan for a unanimous Court articulated the dualistic analysis of federal-question jurisdiction which reconciles *American Well Works* with *Smith*:

> The most familiar definition of the statutory "arising under" limitation is Justice Holmes' statement, "A suit arises under the law that creates the cause of action." . . . However, it is well settled that Justice Holmes' test is more useful for describing the vast majority of cases that come within the district court's original

[86] *Id.* at 214 (Holmes, J., dissenting).

[87] *Id.* at 215 (Holmes, J., dissenting).

[88] *See* Note 81, *supra*.

[89] 463 U.S. 1 (1983)

[90] *Id.* at 8.

> jurisdiction than it is for describing which cases are beyond the district court jurisdiction. We have often held that a case "arose under" federal law where the vindication of a right under state law necessarily turned on some construction of federal law, . . . and even the most ardent proponent of the Holmes test has admitted that it has been rejected as an exclusionary principle. . . . Leading commentators have suggested that for purposes of § 1331 an action "arises under" federal law "if in order for the plaintiff to secure the relief sought he will be obliged to establish both the correctness and the applicability to his case of a proposition of federal law."[91]

Plainly the *Franchise Tax Board* Court did not view the test announced by Justice Holmes in *American Well Works* as the only door open to federal-question jurisdiction. Rather, if "the 'law that creates the cause of action' is state law, [then] original federal jurisdiction is unavailable unless [(1)] it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or [(2)] that . . . the . . . claim is 'really' one of federal law."[92] In other words, "[e]ven though state law creates [plaintiff]'s cause of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint establishes that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties."[93]

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[91] *Id.* at 8-9. (citing *American Well Works, supra*; *Smith, supra*; *Hopkins, supra*; *Flournoy v. Wiener*, 321 U.S. 253, 270-72 (1944) (Frankfurter, J., dissenting); *T.B. Harms, supra* (Friendly, J.); and P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 889 (2d ed. 1973)).

[92] *Id.* at 13.

[93] *Id.*

These dual but independent avenues of federal-question jurisdiction were confirmed – not abandoned, as Petitioner asserts – in *Merrell Dow*. The five-justice *Merrell Dow* majority expressly recognized federal-question jurisdiction in *Smith*-type cases – a telling fact as to *Merrell Dow*'s actual place in this body of jurisprudence;[94] and the continued vitality of the *Smith/Franchise Tax Board* analysis was even more strongly confirmed by the four-justice *Merrell Dow* minority.[95] Thus, whatever else may be said of *Merrell Dow,* the Court unanimously rejected any suggestion that it was over-ruling or even abandoning *sub silentio* *Smith*-type jurisdiction.

What, in fact, separates the majority and the minority in *Merrell Dow* was essentially their assessment of the importance of the concern for "practicality and necessity" in making the "arising under" determination in a case which might well have opened the federal courthouse doors to every tort action in which a state legislature or judiciary borrowed a federal standard as shorthand for establishing the duty of care. This problem – which prompted the *Merrell Dow* Court to employ Justice Cardozo's suggestion to exercise "that common-sense accommodation of judgment to kaleidoscopic situations which characterize the law in its treatment of problems of causation"[96] – led predictably to

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[94] "We have, however, also noted that a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law.'" *Merrell Dow, supra*, at 809-10 (quoting *Franchise Tax Board, supra*, at 9) (but also noting that "[o]ur actual holding in *Franchise Tax Board* demonstrates that this statement must be read with caution. . . .").

[95] *Id.* at 820 (Brennan, J., White, J., Marshall, J., Blackmun, J., dissenting) ("The continuing vitality of *Smith* is beyond challenge. We have cited it approvingly on numerous occasions, and reaffirmed its holding several times – most recently just three Terms ago by a unanimous Court in *Franchise Tax Board*. . . .").

[96] *Id.* at 813 (quoting *Franchise Tax Board, supra*, at 20-21 (quoting *Gully, supra*, at 117-18)).

differing judgments and conclusions. Despite Petitioner's dire predictions to the contrary, no such problem is presented in this case. Here, state law is the mere vehicle through which a contested federal right is to be vindicated, while in *Merrell Dow* state law was the source of the substantive right into which a federal standard was voluntarily imported as a benchmark for one element of the cause of action. Moreover, given the rare and definable nature of the type of case presented here – one which alleges and turns upon whether the federal government violated a federal standard protecting a federally-created right to notice – such a policy concern is not implicated.

The existence of two alternative methods of acquiring federal-question jurisdiction – the federal cause of action (per *American Well Works)* and the substantial federal question within a state cause of action (per *Smith*) – was confirmed by the Court after *Merrell Dow* in *City of Chicago v. International College of Surgeons*.[97] In that case, the defendant city's administrative body repeatedly denied plaintiff's request for a permit to renovate its property on the grounds that the buildings had been designated historic landmarks.[98] The plaintiff appealed the administrative decision to the state court of general jurisdiction under the Illinois Administrative Review Law.[99] In that state-law cause of action, the plaintiff alleged that the defendant's actions violated certain constitutional protections.[100] In concluding that federal-question jurisdiction existed, this Court determined that "[i]n this case, there can be no question that ICS' state court complaints raised a number of

[97] 522 U.S. 156 (1997). It was also confirmed earlier in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 809 (1988).

[98] *Id.* at 160.

[99] *Id.*

[100] *Id.*

issues of federal law;"[101] even though it recognized that "the federal constitutional claims were raised by way of a cause of action created by state law, namely, the Illinois Administrative Review Law."[102] The Court then restated the analytical framework which is controlling in this case:

> As we have explained . . . "[e]ven though state law creates [a party's] cause of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint establishes that its right to relief under state law requires resolution of a substantial question of federal law." . . . ICS' federal constitutional claims, which turn exclusively on federal law, unquestionably fit within this rule. Accordingly ICS errs in relying on the established principle that a plaintiff, as master of the complaint can "choose to have the cause heard in state court." . . . By raising several claims that arise under federal law, ICS subjected itself to the possibility that the City would remove the case to the federal courts.[103]

Thus, again and again this Court has concluded that the jurisdictional tests in *American Well Works* and *Smith* are to be understood as complementary, not contradictory. It is

[101] *Id.* at 164.

[102] *Id.*

[103] *Id.* (citing *Franchise Tax Board, supra,* at 13; *Gully, supra,* at 112; and *Caterpillar, supra,* at 398-99). The factual similarity to the instant case is striking. Just as the ICS' state court complaint was based on a state-law procedural cause of action, Petitioner's state court complaint was based on a Michigan procedural statute and remedy – a quiet title cause of action created by Michigan's Revised Judicature Act. As the Court found in *City of Chicago*, this fact alone is insufficient to deny the federal courts jurisdiction when the Petitioner's "well-pleaded complaint establishes that its right to relief under state law requires resolution of a substantial question of federal law." *Id.*

under the *Smith* leg of that dual formulation of jurisdiction that the instant case is properly analyzed; but what does it mean that one's "right to relief under state law requires resolution of a substantial question of federal law"?[104] The most complete statement of the rules for making this determination is found in Justice Cardozo's majority opinion in *Gully v. First National Bank in Meridian*,[105] a case that both confirmed and explained the analytical process for determining *Smith*-type federal-question jurisdiction:

> How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. . . . A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto . . . , and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . .[106]

[104] *Id.*

[105] 299 U.S. 109 (1936).

[106] *Id.* at 112-13 (citing *Starin, supra*, at 257 (1885); *First National Bank, supra*, at 512 (1920); *King County v. Seattle School District*, 263 U.S. 361, 363-64 (1923); *New Orleans v. Benjamin*, 153 U.S. 411, 424 (1894); *Defiance Water Co. v. Defiance*, 191 U.S. 184, 191 (1903); *Joy, supra*; *City and County of Denver v. New York Trust Co.*, 229 U.S. 123, 133 (1913); *Union & Planters' Bank, supra*; *Motley, supra*; *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); and *Taylor, supra*).

* * *

> [T]here [is] a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are *basic* and those that are *collateral*, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.[107]

Justice Cardozo, on behalf of the Court, thus articulated a three-part analysis to guide the exercise of federal jurisdiction in cases presented through a state-law cause of action.[108] *First,* the resolution of the question must be outcome determinative to the case such that the federal

[107] *Id.* at 118 (emphasis added).

[108] It is a condensed version of Justice Cardozo's *Gully* analysis that this Court used to describe and analyze these *Smith*-type cases in *Franchise Tax Board:* If "the 'law that creates the cause of action' is state law, [then] original federal jurisdiction is unavailable unless [(1)] it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims, or [(2)] that . . . the . . . claim is 'really' one of federal law." *Franchise Tax Board, supra*, at 13. In other words, "[e]ven though state law creates [plaintiff]'s cause of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint establishes that its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Id.* at 13.

question must be decided in order to resolve the matter.[109] *Second,* the federal question must actually be in dispute between the parties.[110] *Third,* the federal question to be resolved must be "substantial" (i.e., must implicate a substantial federal interest).[111] The instant case satisfies each of these requirements.

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[109] *Gully*, *supra*, at 112 ("The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.").

[110] *Id.* at 113 ("A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto. . . .").

[111] *Id.* at 118 ("[T]here [is] a selective process which picks the substantial causes out of the web and lays the other ones aside."), and *Franchise Tax Board, supra,* at 13. *See also Merrell Dow, supra*, at 814, n. 12. The Court there noted that the substantiality inquiry is "really" a federal interest inquiry:

> Several commentators have suggested that our § 1331 decisions can best be understood as an evaluation of the *nature* of the federal interest at stake.
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> * * *
>
> Focusing on the nature of the federal interest, moreover, suggests that the widely perceived "irreconcilable" conflict between the finding of federal jurisdiction in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), and the finding of no jurisdiction in *Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205 (1934), . . . is far from clear. For the difference in results can be seen as manifestations of the differences in the nature of the federal issues at stake. In *Smith,* as the Court emphasized, the issue was the constitutionality of an important federal statute. * * * In *Moore,* in contrast, the Court emphasized that the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action. See 291 U.S., at 216-217. * * *

2. The Elements Of The *Gully/Franchise Tax Board* Analysis As Applied To The Instant Case

a. Resolution Of The Federal Question Is Outcome Determinative

In the present matter, resolution of the federal question is outcome determinative to Petitioner's claim. It is clear that "[t]he right or immunity [is] such that it [is] supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another."[112] Petitioner's claim is that under 26 U.S.C. § 6331 *et seq*., the steps taken by the IRS to apprise Petitioner of the seizure, foreclosure, and sale of its property in satisfaction of a tax levy were insufficient to terminate its title to the property, thus rendering the consequent transfer of title to Respondent invalid, making Respondent's recorded tax deed a cloud on Petitioner's title. Petitioner's claim turns entirely upon the quality of notice required by the part of the Code incorporated by Petitioner in its complaint. If federal law requires "strict compliance" with 26 U.S.C. § 6335, Petitioner prevails; if "substantial compliance" is sufficient under 26 U.S.C. § 6339, Respondent prevails. Thus, the Petitioner's claim will be successful if 26 U.S.C. § 6331 *et seq*. is given one construction and defeated if it is given another.

b. The Federal Question Is In Dispute

The federal question is, in fact, in dispute between the parties. There is "[a] genuine and present controversy, not merely a possible or conjectural one, [which] exist[s] with reference. . . ."[113] to the federal question. The federal

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[112] *Id.* at 112.

[113] *Id.* at 113.

question is the principal matter in dispute between the parties. The legal question presented by this case (beyond the present jurisdictional question) is whether substantial compliance by the IRS under 26 U.S.C. § 6331 *et seq*. was sufficient for the divestment of title to the property from Petitioner and the vesting of that title in Respondent, or whether strict compliance with 26 U.S.C. § 6331 *et seq*. was required to accomplish the transfer.[114]

c. The Federal Question Is Substantial

Finally, and perhaps most importantly, the federal question presented in this case is "substantial" in that its resolution necessarily implicates a substantial federal interest. Although *Smith* and *City of Chicago* presented federal questions of an explicitly constitutional variety, such constitutional interests are also present in this case, albeit less directly. 26 U.S.C. § 6331 *et seq.* is manifestly designed to strike a balance between the federal government's interest in raising revenue by collecting taxes and enforcing the Code, and the taxpayer's constitutional interests in not being deprived of his property without due process and proper notice – i.e. the taxpayer's Fifth Amendment rights.[115] This

[114] Even the issue of Petitioner's unreasonable delay in bringing this action – a standard equitable defense – has been treated as implicated in the statutory interpretation, rather than preempting that interpretation. *See Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.*, 207 F.Supp. 694, 697-98 (W.D.Mich. 2002).

[115] U.S. CONST. amend. V. *See also Aqua Bar & Lounge, Inc. v. U.S. Dept. of Treasury Internal Revenue Service*, 539 F.2d 935, 939 (3rd Cir. 1976) (citing *Thatcher v. Powell*, 19 U.S. (6 Wheat) 119, 125 (1821); and *Reece v. Scroggins*, 506 F.2d. 967, 971 (5th Cir. 1975)) ("The inviolability of private ownership has long been a fundamental principle of our nation's jurisprudence. . . . In recognition of this principle, Congress has imposed precise strictures on the seizure and sale of an individual's property by the IRS to satisfy legitimate tax deficiencies. These provisions, which the plaintiff contends were not complied with in the instant case, are for the obvious protection of the taxpayer faced with

statutory scheme has a direct bearing on the federal government's ability to effectively enforce the tax code and raise revenue. The seizure provisions found in Subchapter D, Part II (being 26 U.S.C. § 6331 *et seq.)* do more than establish the substantive property rights of buyers at a tax sale (though they certainly do that);[116] they set forth the procedural scheme by which the federal government dispossesses delinquent taxpayers of their property in satisfaction of their tax obligations – without violation of the taxpayers' constitutional rights – and resells that property to third parties in order to raise revenue.[117] There is an obvious federal interest in ensuring the effective collection of tax revenue and in controlling the minimum value and marketability of property seized in pursuit of that interest; but at the same time there exists a substantial countervailing interest in assuring that the constitutional rights of delinquent taxpayers are not trampled.[118] Given that resolution of the federal question in this case – whether strict or substantial compliance with the notice provisions of 26 U.S.C. § 6331 *et seq*. is required in order for Respondent's title to be good as against Petitioner – will necessarily affect this balance, the federal question is substantial.

the loss of his property."). The existence of an express constitutional dispute is plainly not a precondition to *Smith*-type jurisdiction as is evident from *Hopkins* – a case virtually indistinguishable from this one – in which this Court found federal-question jurisdiction to be appropriate.

[116] 26 U.S.C. § 6339(b)(2) ("If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.").

[117] *See, generally*, 26 U.S.C. §§ 6335-6339.

[118] *See also* discussion in Section C.3.b., *infra*.

d. The Instant Case Therefore Satisfies The *Gully/Franchise Tax Board* Analysis

In sum, even though the procedural statute providing for Petitioner's cause of action is a Michigan statute,[119] the District Court nonetheless had jurisdiction under 28 U.S.C. §§ 1331 and 1441. Applying the three-factor *Gully* analysis as restated in *Franchise Tax Board,* Petitioner's "well-pleaded complaint establishes that its right to relief under state law [(1)] requires resolution [(2)] of a substantial question of federal law [(3)] in dispute between the parties."[120] Thus, jurisdiction was appropriately found.

3. The Proper Role Of *Merrell Dow*

Notwithstanding that Petitioner's well-pleaded complaint states a cause of action "arising under" federal law such that the exercise of federal jurisdiction by the District Court was appropriate under the *Smith/Gully/Franchise Tax Board/City of Chicago* analysis, Petitioner's misreading of the *Merrell Dow* decision, coupled with its improper reliance on *Beneficial National Bank v. Anderson,*[121] has led it to conclude that this Court has, with less of a bang and more of a whimper, simply done away with almost a century's worth of jurisprudence in this area. Despite this Court's express reaffirmation of the *Smith* rule in *Franchise Tax Board,*[122] *Merrell Dow,*[123] *Christianson,*[124] and *City of Chicago,*[125] Petitioner posits that the Court has abandoned altogether the *Smith* rule and adopted instead Justice Holmes' rule from *American Well Works* in which the only way for non-diverse

[119] *See* MICH. COMP. LAWS § 600.2932, and MICH. CT. R. 3.411.
[120] *Franchise Tax Board, supra,* at 13.
[121] 539 U.S. 1 (2003).
[122] 463 U.S. 1 (1983).
[123] 478 U.S. 804 (1986).
[124] 486 U.S. 800 (1988).
[125] 522 U.S. 156 (1997).

parties to access the federal courts is through a federally-created cause of action. *Merrell Dow*, however, is merely a specific application of the *Smith/ Gully/Franchise Tax Board* analysis in a context where the federal question was – to borrow Justice Cardozo's paradigm from *Gully* – "collateral" rather than "basic," and various policy concerns militated against the finding of federal jurisdiction. *Merrell Dow* did not and was not intended to establish the long elusive "single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district court."[126] Rather, it was yet another refinement of the "welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system."[127]

Justice Stevens stated the question presented in *Merrell Dow* as follows: "whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private right of action for violations of that federal standard, makes the action one 'arising under the Constitution, laws or treaties of the United States.'"[128] In *Merrell Dow,* the plaintiffs filed product liability suits under Ohio law in Ohio state court.[129] One of the counts of the plaintiffs' complaint alleged that the at-issue drug had been "misbranded" under the FDCA which (1) gave rise to a rebuttable presumption of negligence under Ohio law and (2) caused plaintiff's injury.[130]

The defendant removed to federal court. On appeal, the Sixth Circuit, relying on *Franchise Tax Board,* concluded federal-question jurisdiction was lacking. In affirming the holding of the Court of Appeals, this Court

[126] *Franchise Tax Board, supra* at 8.
[127] *Id.*
[128] *Merrell Dow, supra,* at 805.
[129] *Id.* at 805-06.
[130] *Id.*

noted that "[t]he 'vast majority' of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that 'a suit arises under the law that creates the cause of action.' . . . Thus, the vast majority of cases brought under the general federal-question jurisdiction of the federal courts are those in which federal law creates the cause of action."[131] The Court acknowledged – albeit with a cautionary caveat – "that a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law.'"[132] After noting that the case before it was precisely of this latter variety, the Court proceeded to engage in a *Gully/Franchise Tax Board* analysis of whether a "substantial" federal question was presented.[133]

> In undertaking this inquiry into whether jurisdiction may lie for the presence of a federal issue in a nonfederal cause of action, it is, of course, appropriate to begin by referring to our understanding of the statute conferring federal-question jurisdiction. We have consistently emphasized that, in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system. "If the history of the interpretation of judiciary legislation teaches us anything, it teaches the duty to reject treating such statutes as a wooden set of self-sufficient words. . . . The Act of 1875 is broadly phrased, but it has been continuously construed and limited in the light of the history that produced it, the demands of reason and coherence, and the dictates of sound judicial policy which have emerged from the Act's function as a provision in the mosaic of federal judiciary legislation." . . . In *Franchise Tax Board,* we forcefully reiterated this need for prudence and restraint in the jurisdictional inquiry: "We have always interpreted . . . 'the current of jurisdictional legislation since the Act of March 3, 1875' . . . with an eye to practicality and necessity."[134]

The Court noted that Congress had not provided any express or implied remedy for violation of the federal standard at issue.[135] The Court concluded that under such circumstances "it would . . . flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a 'rebuttable presumption' or a 'proximate cause' under state law, rather than a federal action under federal law."[136]

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[131] *Id.* at 808. This statement alone reflects the Court's recognition that *some* federal-question cases do *not* involve federally-created causes of action.

[132] *Id.* at 808-09.

[133] *Id.* at 809-10 (quoting *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 470 (1957) (Frankfurter, J., dissenting)) ("This case does not pose a federal question of the first kind; respondents do not allege that federal law creates any of the causes of action that they have asserted. This case thus poses what Justice Frankfurter called the 'litigation-provoking problem,' . . . the presence of a federal issue in a state-created cause of action.").

[134] *Id.* at 810 (quoting *Romero v. International Terminal Operating Co.,* 358 U.S. 354, 379 (1959); and *Franchise Tax Board, supra,* at 20).

[135] The instant case is dissimilar in this respect from *Merrell Dow.* Congress, in fact, has provided an express federal remedy through which Petitioner could have sought vindication of its federal notice rights under the seizure provisions of the Code. Petitioner elected – as was its right – not to pursue that remedy; but as in *City of Chicago,* Petitioner could not thereby avoid the essential federal question inherent in its claim even as it pursued a state-law remedy.

[136] *Id.*

In rejecting the petitioner's jurisdictional argument, the Court relied heavily on "Justice Cardozo's emphasis on principled, pragmatic distinctions: 'What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of causation . . . a selective process which picks the substantial causes out of the web and lays the other ones aside.'"[137] The absence of a congressionally-ordained private right of action to enforce the federal *standard* which Ohio law incorporated into its state-law cause of action, confirmed the already apparent lack of "substantiality" under the *Gully/Franchise Tax Board* analysis: "Given the significance of the assumed congressional determination to preclude federal private remedies, the presence of the federal issue as an element of the state tort is not the kind of adjudication for which jurisdiction would serve congressional purposes and the federal system. . . ."[138]

Petitioner misapprehends what was and was not determined in *Merrell Dow*. *First*, although the Court recognized that it would be the "rare case," it expressly reaffirmed the continued viability of *Smith*-type jurisdictional cases – i.e., state-law causes of action that necessarily present disputed substantial federal questions can be removed to federal court. *Second*, the Court held that in *Smith*-type cases, the question of "substantiality" of the federal question can be established by evidence of either an explicit or implicit congressional grant of a private right of action. However, it did not (as Petitioner here claims) hold

[137] *Id.* at 813-14 (quoting *Franchise Tax Board*, *supra*, at 20-21 (quoting *Gully*, *supra*, at 117-18)). The emphasis placed on this concern in *Merrell Dow* is logical. If the case had been decided otherwise, every state-law tort action which incorporated by reference a federal standard as the state-law standard for duty or breach could be removed to federal court.

[138] *Id.* at 814.

that the absence of a federally-created private right of action *per se* defeats federal jurisdiction.[139] *Third*, the Court held that, absent a private right of action to enforce a federal standard, the mere incorporation of that standard by a state as part of its tort law does not give rise to a sufficiently substantial federal interest to warrant the exercise of federal-question jurisdiction. As will be discussed next, these three features of the *Merrell Dow* decision both harmonize it with the existing body of jurisprudence on this issue and distinguish its outcome from the instant case.

a. Federal Law Is The Substantive Basis For Petitioner's Claim

In *Merrell Dow*, the Court considered the absence of a private right of action to vindicate the federal standard in question as evidence of the absence of a *substantial* federal question. In so doing, the Court was both preserving the *Gully/Franchise Tax Board* analysis (by holding that the existence of a federally-created private right of action is evidence of substantiality), and holding that in cases where the federal question is (to borrow Justice Cardozo's characterization)[140] "collateral" rather than "basic" to the underlying dispute – as was the case in *Merrell Dow* – the absence of any federal private right of action was fatal to jurisdiction.

Both the substantive claim and the procedural cause of action in *Merrell Dow* were firmly rooted in state law. The only "contact" with federal law was the voluntary incorporation by the state of a federal regulatory *standard* as

[139] In fact, the Court plainly considered – though it ultimately rejected – the petitioner's proffered federal interest *after* concluding there was no federal private right of action. That analysis would have been wholly unnecessary if the absence of a federal right of action was the jurisdictional litmus test that Petitioner here claims.

[140] *Gully*, *supra*, at 118.

the standard of care or duty to be applied in that state-law cause of action. If *Merrell Dow* can be said to have presented any federal question, it was, at best, a "collateral" one. The question for interpretation was not one of federal law, but of state law. The case did not demand resolution of a federal law, but resolution of the state-law standard for negligence. The fact that the Ohio common law had developed a standard of care co-extensive with a federal regulatory standard did not convert that state-law standard into a federal question any more than if the Ohio legislature had instead simply incorporated the actual language of the federal statute into a state statute.[141] The fact that a state law is co-extensive or substantially the same as a federal law does not make its interpretation a federal question.[142]

Petitioner's case presents a distinctly different situation. The federal question at issue here is the substantive source of Petitioner's cause of action; its resolution is outcome determinative. Resolution of the question – whether the Code requires strict or substantial compliance with its notice provisions in order for good title to pass to tax sale purchasers – is *only* an interpretation of *federal* law. State law here has not simply adopted a federal standard as a matter of legislative choice or judicial convenience; it is constitutionally subservient to and

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[141] *See, e.g., Merrell Dow, supra,* at 814, n. 12 ("In *Moore*[, *supra*], . . . the Court emphasized that the violation of the federal standard as an element of state tort recovery did not fundamentally change the state tort nature of the action."). *See also* Brief for Respondent Thompson, *Merrell Dow, supra,* at 26 (No. 85-619) ("[T]he focus is not on the implementation of the FDCA, but on whether the common law of the State of Ohio will adopt as a standard of care in a tort action provisions making the misbranding of drugs evidence of negligence *per se*.").

[142] This conclusion is buttressed by the fact that on the facts of *Merrell Dow,* the plaintiffs could have succeeded on the merits without even mentioning the FDCA standard. As noted before, the application of the "outcome determinative" standard from *Gully* leads to the conclusion reached by the Court in *Merrell Dow.*

compelled to honor the substantive federal rule by force of the Supremacy Clause.[143]

Moreover, resolution of that federal question will impact the balance Congress has struck between the respective rights and interests of the involved parties. The only federal issue in *Merrell Dow* was a federal *standard* that had been adopted and incorporated into the governing state law. Here, however, what is at issue is a federal substantive statute which, of its own force, apportions and allocates rights and liabilities amongst delinquent taxpayers, the federal government, and tax sale buyers; and it is that very apportionment and allocation, as determined by Congress, which either affirms or negates Petitioner's right to the Property. Use of the "private right of action" consideration as a rule of exclusion may make sense in a case where the federal law at issue is a federal *standard* "collateral" to the plaintiff's state cause of action; but it is better used as a rule of inclusion where the federal law at issue is a federal *substantive* statute creating and demarcating (i.e., "basic" to) the federal substantive rights which the plaintiff seeks to enforce. Consistent with the traditional *Smith*-type analysis, the instant case presents, as an essential part of Petitioner's case, a federal question which is determinative of the outcome, is actually contested, and is substantial.

b. Petitioner Misconstrues The "Private Right Of Action" Analysis

Even if *Merrell Dow* were not so distinguishable, Petitioner's interpretation of it would remain misguided. Petitioner (and *Amicus* Mikulski) appear to argue that

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[143] U.S. CONST. art. VI, cl. 2. *See also McCulloch v. Maryland,* 17 U.S. 316, 326-27 (1819); and *Kalb v. Feuerstein,* 308 U.S. 433, 439 (1940) (citing *Hines v. Lowery,* 305 U.S. 85 (1938); and *Davis v. Wechsler,* 263 U.S. 22 (1921)).

Merrell Dow holds, in effect, that if a plaintiff's cause of action is not a federally-created cause of action, federal-question jurisdiction is lacking.[144] Were that correct, this

[144] *See* Brief of *Amici Curiae* Jerome R. Mikulski *et ux.* in Support of Petitioner, p. 3 ("The Court eliminated the 'substantial federal question' doctrine as a sufficient basis for removal jurisdiction in *Beneficial National Bank*, just as it had for original jurisdiction in *Merrell Dow*, where Congress has not provided a federal private right of action for violation of the particular federal statue."). *Amicus* Mikulski builds on this misconstruction of *Merrell Dow* to posit that the Court has now altogether eliminated *Smith*-type federal-question jurisdiction in *Beneficial National Bank v. Anderson*, 503 U.S. 1 (2003). *Amicus*' interpretation of *Beneficial* ignores both its context and its language. The case concerned whether removal could be defeated by a plaintiff pleading a state claim which was wholly preempted by federal law. It is well-settled that where no state-law claim can exist, removal of what purports to be – but is not – a "state claim" is permitted. *See, e.g., Avco Corp. v. Aero Lodge*, 390 U.S. 557 (1968) (the seminal case in the LMRA context); and *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987) (the seminal case in the ERISA context). *Beneficial* merely extends that rule to include usury claims against banks incorporated under the National Bank Act. The Court did not have occasion to consider cases (such as Petitioner's) in which a state-law procedural cause of action remains viable. If *Amicus* Mikulski reading of *Beneficial* were correct, the Court could hardly have chosen a more inscrutable and oblique method of overturning a century of federal-question jurisprudence than through a case which did not raise or consider that question and body of law. Respectfully, *Amicus* Mikulski's reading of *Beneficial* is completely undermined by the factual context and legal analysis of that case. Further, while the Court in *Beneficial* stated that a "federal *claim*" must be present for removal, it did *not* state that a "federal *cause of action*" must be present. The two concepts are not fungible. *See U.S. v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68 (1933) ("A 'cause of action' may mean one thing for one purpose and something different for another. . . . At times and in certain contexts, it is identified with the infringement of a right or the violation of a duty. At other times and in other contexts, it is a concept of the law of remedies. . . . This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed."). Petitioner's "cause of action" is, without question, a creature of state law, but that does not answer the question of whether its "claim" is federal. Insofar as Petitioner asserts its right to the Property

Court would hardly have needed to do more than cite Justice Holmes' opinion in *American Well Works* and announce that the jurisprudential efforts of the intervening 65 years had all been a terrible mistake. Clearly the Court's intention was more subtle than that.

Merrell Dow did not conclude that the plaintiff must have *the same* private right of action under federal law as he is pursuing under state law. It can be read, at most, as holding that the absence of *any* federal private right of action to enforce or vindicate the federal statute is evidence the federal question lacks substantiality. In *Merrell Dow,* Congress had afforded *no* private remedy whatsoever to enforce or vindicate the standard set up in the FDCA. The absence of any federal private right of action to vindicate the plaintiff's interests in that standard belied the notion that any *substantial* federal interest was implicated in the plaintiff's claim. Here, however, Congress has created a federal statutory cause of action through which a taxpayer can vindicate or enforce his notice or other due process rights established in the Code – 26 U.S.C. § 7433. The centrality of these rights to the operation of the Code and of a federal remedy to protect them is manifest. It does not matter to this analysis that this is not the remedy selected by Petitioner.[145]

exists only because it failed to receive the Notice of Seizure in the manner prescribed by federal law (26 U.S.C. § 3665) and that federal law (26 U.S.C. § 6331 *et seq.*) precludes the effective acquisition and conveyance of Petitioner's interest by the IRS without strict compliance with that federal notice standard, Petitioner's "claim" – properly so-called – can *only* be said to be "federal." *Amicus* Mikulski's careless assumption of the interchangeable use of "claim" and "cause of action" leads it to the wrong conclusion. Properly understood, *Beneficial* plays no role in resolution of this matter.

[145] Respondent understands and acknowledges Petitioner's right to select an available state-law remedy and to forego its federal remedy. *See Merrell Dow, supra*, 809, n. 6. The point is that even a state-law remedy can implicate a federal question, and *Merrell Dow* provides that at least one indicator of the substantiality of that federal question is the

The question was (and is) whether Congress has evinced an intention to preclude a federal cause of action and, therefore, to preclude the exercise of federal-question jurisdiction over matters implicating this federal notice standard. In *Merrell Dow* it had; here, it plainly has not.

The historic relationship of 28 U.S.C. §§ 1331 and 1340 provides further evidence that Congress believes that matters involving the national fisc implicate substantial federal interests which warrant a broader exercise of federal court jurisdiction than other federal questions.[146] Until 1980, when Congress removed the "amount in controversy" requirement from 28 U.S.C. § 1331, the general federal-question jurisdiction of the District Courts was limited to those cases which met the minimum jurisdictional amount.[147] However, the federal courts had jurisdiction to hear cases raising more significant federal questions under the other general jurisdiction-granting statutes regardless of the "amount in controversy" requirement.[148] In bifurcating the federal court's federal-question jurisdiction in this way, Congress was effectively excepting certain classes of federal-question cases from the "amount in controversy" requirement – including, notably, cases "arising under any Act of Congress providing for internal revenue"[149] – and was evidencing its belief that these classes of cases were of greater importance, or implicated more substantial federal interests, than federal-question cases in general, and thus, should be afforded greater access to the federal courts for resolution. The federal interests involved in this matter, resting as they do on provisions of the Code, place Petitioner's claim squarely in the category of cases that Congress has unequivocally declared to be of "substantial" federal interest, irrespective of whether the particular vehicle through which the federal question is presented is a state- or federally-based "cause of action."

The existence of both the private right of action under 26 U.S.C. § 7433 of the Code and the historical context of the express jurisdictional grant in 28 U.S.C. § 1340 are strong evidence of a congressional belief that this federal question is substantial enough to warrant federal court jurisdiction. Thus, even if *Merrell Dow* is regarded as an abandonment of the long standing *Smith/Gully/Franchise Tax Board* analytical model, as Petitioner claims, the instant case falls well within the purported *Merrell Dow* jurisdictional dividing line.

c. Proper Role Of *Merrell Dow* – *Redux*

Respondent respectfully asserts that, contrary to Petitioner's argument, this Court's decision in *Merrell Dow* did not eviscerate federal court jurisdiction where a

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existence of *some* federal private right of action to vindicate or enforce the federal right or immunity implicated in the state-law right of action. The case at bar has that indicator. The fact that Petitioner elected to forego pursuit of that federal private right of action does not deprive it of its force as a congressional expression of the substantiality of the federal interest in the resolution and protection of the underlying federal right.

[146] Respondent asks this Court to take note of the fact that, just as in analyzing whether certain cases "arise under" 28 U.S.C. § 1348, *see Christianson, supra*, the analytical framework under 28 U.S.C. § 1340 is identical to that employed under 28 U.S.C. §§ 1331 & 1441. *See, e.g., Wolkstein v. Port of New York Authority*, 178 F.Supp. 209 (D.C.N.J. 1959) (applying the identical *Gully* analysis applied herein to a case the jurisdictional basis for which was 28 U.S.C. § 1340). Therefore, Petitioner's argument regarding whether § 1340 or § 1331 provides the proper statutory basis in this case is irrelevant since the analytical framework for answering the jurisdictional question is identical.

[147] *See* Pub. L. No. 96-417, 94 Stat. 1727 (1980); and H.R. REP. NO. 96-1461 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5063.

[148] *See Zahn v. International Paper Co.*, 414 U.S. 291, 302, n. 11, (1973) ("Of course, Congress has exempted major areas of federal-question jurisdiction from any jurisdictional-amount requirements, see 28 U.S.C. §§ . . . 1336-**1340**. . . ." (emphasis added)).

[149] 28 U.S.C. § 1340 (2004).

substantial question of federal law is presented through a cause of action based on state law. Rather, *Merrell Dow* stands for the proposition that in cases (such as that one) where a federal standard at issue is merely "collateral" to the plaintiff's substantive state-law claim, the failure of Congress to provide any private right of action to vindicate or enforce that federal standard is determinative of the substantiality question when conducting a *Smith/Gully/Franchise Tax Board* analysis. In this way, *Merrell Dow* is both consistent with the body of case law that has developed on this issue over the past century, and distinguished from the instant case. The *Merrell Dow* decision in no way undermines the conclusion that, in this case, an exercise of federal jurisdiction by the District Court was appropriate.

CONCLUSION

As has been demonstrated throughout this brief, this Court's body of federal-question jurisdiction jurisprudence, when taken together as a whole, requires two interdependent analyses in order to determine whether a particular matter "arises under" federal law for purposes of exercising jurisdiction under 28 U.S.C. §§ 1331 and/or 1441: (1) "the well-pleaded complaint rule" and (2) the dual "arising under" jurisdictional analysis of *Smith/Gully/Franchise Tax Board*. Thus, the *first* question is this: Does the plaintiff's well-pleaded complaint necessarily present, as an essential element of the claim, a question of federal law? If "yes," then the *second* question is: (1) Does federal law create the plaintiff's cause of action, or (2) if state law creates the plaintiff's cause of action, is the question of federal law presented by the well-pleaded complaint (a) outcome determinative of plaintiff's claim, (b) in dispute between the parties, and (c) "substantial" such that its resolution impacts substantial federal interests? In the instant matter, the

answer to both questions is "yes," making the exercise of federal-question jurisdiction appropriate.

Petitioner expressly asserts in its complaint that its claim is based on 26 U.S.C. § 6331 *et seq*. It admits in its brief in this Court that the federal question was an essential element of its claim. The relevant Michigan law providing for the procedural vehicle employed by Petitioner required Petitioner to plead the federal question. Finally, under this Court's analysis and decision in *Hopkins*, the federal question was an essential element of its well-pleaded complaint. There is simply no question that Petitioner's well-pleaded complaint necessarily presented the following federal question on its face: Does 26 U.S.C. § 6331 *et seq.* require a federal agency (the IRS) to strictly comply with the federal notice requirements of 26 U.S.C. § 6335 in order to effectively seize and convey Petitioner's property to Respondent, or, under 26 U.S.C. § 6339, is such seizure and conveyance effective upon substantial compliance with the federal notice requirements?

There is no dispute that federal law did not, explicitly, "create" Petitioner's "cause of action." The issue then becomes whether this federal question is (1) outcome determinative of Petitioner's claim, (2) in dispute between the parties, and (3) substantial. As has been discussed, the answer to all three facets of this question is "yes." Petitioner's action comes well within this Court's long-standing and repeatedly affirmed standards of federal-question jurisdiction.

To the extent that *Merrell Dow* has application outside the realm of cases which present claims based on substantive state law incorporating federal standards by reference as "stand-ins" for the state-law standard, the "private right of action" inquiry conducted in that case goes to the third element of the *Gully/Franchise Tax Board* analysis – namely, the substantiality of the federal question.

It is difficult to fathom how the interpretation of a federal statute reflecting Congress' efforts to balance the property and due process interests of taxpayers and tax-sale purchasers and the fiscal interests of the federal government in the enforcement and operation of its revenue authority could be other than "substantial." Indeed, Congress' determination of the substantiality of the federal question in this case is manifest, both from its creation of a private right of action which Plaintiff could have brought to vindicate its federal notice rights under 26 U.S.C. § 7433 and from its historical exception (through 28 U.S.C. § 1340) of such claims from the amount in controversy requirements of 28 U.S.C. §§ 1331.

The exercise of federal-question subject matter jurisdiction under 28 U.S.C. § 1331 and 1441 by the District Court was, as the Sixth Circuit found, appropriate. The judgments of the Sixth Circuit and the District Court below should be AFFIRMED.

Respectfully submitted,

MICHAEL C. WALTON
Counsel of Record
JOHN M. LICHTENBERG
GREGORY G. TIMMER
MARY L. TABIN
ANTHONY A. PEARSON
MATTHEW B. VAN DYK
RHOADES MCKEE
600 Waters Building
161 Ottawa Avenue, N.W.
Grand Rapids, MI 49503
(616) 235-3500

APPENDIX: ADDITIONAL STATUTORY PROVISIONS AT ISSUE

In addition to the statutory provisions noted by the Petitioner, the following constitutional provision and federal statutes are also involved in this matter:

A. U.S. CONST. art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

B. U.S. CONST. amend V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

C. 26 U.S.C. § 6331 *et seq.* (2004) (Title 26; Subtitle F; Chapter 64; Subchapter D; Part II of the United States Code):

§ 6331. Levy and distraint

(a) Authority of Secretary.--If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) Seizure and sale of property.--The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any

case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) Successive seizures.--Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable to levy of the person against whom such claim exists, until the amount due from him, together with all expenses, is fully paid.

(d) Requirement of notice before levy.--

(1) In general.--Levy may be made under subsection (a) upon the salary or wages or other property of any person with respect to any unpaid tax only after the Secretary has notified such person in writing of his intention to make such levy.

(2) 30-day requirement.--The notice required under paragraph (1) shall be—

(A) given in person,

(B) left at the dwelling or usual place of business of such person, or

(C) sent by certified or registered mail to such person's last known address,

no less than 30 days before the day of the levy.

(3) Jeopardy.--Paragraph (1) shall not apply to a levy if the Secretary has made a finding under the last sentence of subsection (a) that the collection of tax is in jeopardy.

(4) Information included with notice.--The notice required under paragraph (1) shall include a brief statement which sets forth in simple and nontechnical terms—

(A) the provisions of this title relating to levy and sale of property,

(B) the procedures applicable to the levy and sale of property under this title,

(C) the administrative appeals available to the taxpayer with respect to such levy and sale and the procedures relating to such appeals,

(D) the alternatives available to taxpayers which could prevent levy on the property (including installment agreements under section 6159),

(E) the provisions of this title relating to redemption of property and release of liens on property, and

(F) the procedures applicable to the redemption of property and the release of a lien on property under this title.

(e) Continuing levy on salary and wages.--The effect of a levy on salary or wages payable to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released under section 6343.

(f) Uneconomical levy.--No levy may be made on any property if the amount of the expenses which the Secretary estimates (at the time of levy) would be incurred by the Secretary with respect to the levy and sale of such property exceeds the fair market value of such property at the time of levy.

(g) Levy on appearance date of summons.--

(1) In general.--No levy may be made on the property of any person on any day on which such person (or officer or employee of such person) is required to appear in response to a summons issued by the Secretary for the purpose of collecting any underpayment of tax.

(2) No application in case of jeopardy.--This subsection shall not apply if the Secretary finds that the collection of tax is in jeopardy.

(h) Continuing levy on certain payments.--

(1) In general.--If the Secretary approves a levy under this subsection, the effect of a levy on specified

payments to or received by a taxpayer shall be continuous from the date such levy is first made until such levy is released. Notwithstanding section 6334, such continuous levy shall attach to up to 15 percent of any specified payment due to the taxpayer.

(2) Specified payment.--For the purposes of paragraph (1), the term "specified payment" means—

(A) any Federal payment other than a payment for which eligibility is based on the income or assets (or both) of a payee,

(B) any payment described in paragraph (4), (7), (9), or (11) of section 6334(a), and

(C) any annuity or pension payment under the Railroad Retirement Act or benefit under the Railroad Unemployment Insurance Act.

(3) Increase in levy for certain payments.--Paragraph (1) shall be applied by substituting "100 percent" for "15 percent" in the case of any specified payment due to a vendor of goods or services sold or leased to the Federal Government.

(i) No levy during pendency of proceedings for refund of divisible tax.--

(1) In general.--No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid divisible tax during the pendency of any proceeding brought by such person in a proper Federal trial court for the recovery of any portion of such divisible tax which was paid by such person if—

(A) the decision in such proceeding would be res judicata with respect to such unpaid tax; or

(B) such person would be collaterally estopped from contesting such unpaid tax by reason of such proceeding.

(2) Divisible tax.--For purposes of paragraph (1), the term "divisible tax" means—

(A) any tax imposed by subtitle C; and

(B) the penalty imposed by section 6672 with respect to any such tax.

(3) Exceptions.—

(A) Certain unpaid taxes.-- This subsection shall not apply with respect to any unpaid tax if—

(i) the taxpayer files a written notice with the Secretary which waives the restriction imposed by this subsection on levy with respect to such tax; or

(ii) the Secretary finds that the collection of such tax is in jeopardy.

(B) Certain levies.--This subsection shall not apply to—

(i) any levy to carry out an offset under section 6402; and

(ii) any levy which was first made before the date that the applicable proceeding under this subsection commenced.

(4) Limitation on collection activity; authority to enjoin collection.—

(A) Limitation on collection.--No proceeding in court for the collection of any unpaid tax to which paragraph (1) applies shall be begun by the Secretary during the pendency of a proceeding under such paragraph. This subparagraph shall not apply to—

(i) any counterclaim in a proceeding under such paragraph; or

(ii) any proceeding relating to a proceeding under such paragraph.

(B) Authority to enjoin.--Notwithstanding section 7421(a), a levy or collection proceeding prohibited by this subsection may be enjoined (during the period such prohibition is in force) by the court in which the proceeding under paragraph (1) is brought.

(5) Suspension of statute of limitations on collection.--The period of limitations under section 6502 shall be suspended for the period during which the Secretary is prohibited under this subsection from making a levy.

(6) Pendency of proceeding.--For purposes of this subsection, a proceeding is pending beginning on the date such proceeding commences and ending on the date that a final order or judgment from which an appeal may be taken is entered in such proceeding.

(j) No levy before investigation of status of property.—

(1) In general.--For purposes of applying the provisions of this subchapter, no levy may be made on any property or right to property which

is to be sold under section 6335 until a thorough investigation of the status of such property has been completed.

(2) Elements in investigation.--For purposes of paragraph (1), an investigation of the status of any property shall include--

(A) a verification of the taxpayer's liability;

(B) the completion of an analysis under subsection (f);

(C) the determination that the equity in such property is sufficient to yield net proceeds from the sale of such property to apply to such liability; and

(D) a thorough consideration of alternative collection methods.

(k) No levy while certain offers pending or installment agreement pending or in effect.--

(1) Offer-in-compromise pending.-- No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid tax—

(A) during the period that an offer-in-compromise by such person under section 7122 of such unpaid tax is pending with the Secretary; and

(B) if such offer is rejected by the Secretary, during the 30

days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending).

For purposes of subparagraph (A), an offer is pending beginning on the date the Secretary accepts such offer for processing.

(2) Installment agreements.--No levy may be made under subsection (a) on the property or rights to property of any person with respect to any unpaid tax—

(A) during the period that an offer by such person for an installment agreement under section 6159 for payment of such unpaid tax is pending with the Secretary;

(B) if such offer is rejected by the Secretary, during the 30 days thereafter (and, if an appeal of such rejection is filed within such 30 days, during the period that such appeal is pending);

(C) during the period that such an installment agreement for payment of such unpaid tax is in effect; and

(D) if such agreement is terminated by the Secretary, during the 30 days thereafter (and, if an appeal of such

termination is filed within such 30 days, during the period that such appeal is pending).

(3) Certain rules to apply.--Rules similar to the rules of—

(A) paragraphs (3) and (4) of subsection (i), and

(B) except in the case of paragraph (2)(C), paragraph (5) of subsection (i),

shall apply for purposes of this subsection.

(l) Cross references.--

(1) For provisions relating to jeopardy, see subchapter A of chapter 70.

(2) For proceedings applicable to sale of seized property, see section 6335.

(3) For release and notice of release of levy, see section 6343.

§ 6332. Surrender of property subject to levy

(a) Requirement.--Except as otherwise provided in this section, any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the Secretary, surrender such property or rights (or discharge such obligation) to the Secretary, except such part of the property or rights as is, at the time of such demand, subject to an attachment or execution under any judicial process.

(b) Special rule for life insurance and endowment contracts.--

(1) In general.--A levy on an organization with respect to a life insurance or endowment contract issued by such organization shall, without necessity for the surrender of the contract document, constitute a demand by the Secretary for payment of the amount described in paragraph (2) and the exercise of the right of the person against whom the tax is assessed to the advance of such amount. Such organization shall pay over such amount 90 days after service of notice of levy. Such notice shall include a certification by the Secretary that a copy of such notice has been mailed to the person against whom the tax is assessed at his last known address.

(2) Satisfaction of levy.--Such levy shall be deemed to be satisfied if such organization pays over to the Secretary the amount which the person against whom the tax is assessed could have had advanced to him by such organization on the date prescribed in paragraph (1) for the satisfaction of such levy, increased by the amount of any advance (including contractual interest thereon) made to such person on or after the date such organization had actual notice or knowledge (within the meaning of section 6323(i)(1)) of the existence of the lien with respect to

which such levy is made, other than an advance (including contractual interest thereon) made automatically to maintain such contract in force under an agreement entered into before such organization had such notice or knowledge.

(3) Enforcement proceedings.--The satisfaction of a levy under paragraph (2) shall be without prejudice to any civil action for the enforcement of any lien imposed by this title with respect to such contract.

(c) Special rule for banks.--Any bank (as defined in section 408(n)) shall surrender (subject to an attachment or execution under judicial process) any deposits (including interest thereon) in such bank only after 21 days after service of levy.

(d) Enforcement of levy.--

(1) Extent of personal liability.--Any person who fails or refuses to surrender any property or rights to property, subject to levy, upon demand by the Secretary, shall be liable in his own person and estate to the United States in a sum equal to the value of the property or rights not so surrendered, but not exceeding the amount of taxes for the collection of which such levy has been made, together with costs and interest on such sum at the underpayment rate established under section 6621 from the date of such levy (or, in the case of a levy described in

section 6331(d)(3), from the date such person would otherwise have been obligated to pay over such amounts to the taxpayer). Any amount (other than costs) recovered under this paragraph shall be credited against the tax liability for the collection of which such levy was made.

(2) Penalty for violation.--In addition to the personal liability imposed by paragraph (1), if any person required to surrender property or rights to property fails or refuses to surrender such property or rights to property without reasonable cause, such person shall be liable for a penalty equal to 50 percent of the amount recoverable under paragraph (1). No part of such penalty shall be credited against the tax liability for the collection of which such levy was made.

(e) Effect of honoring levy.--Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1)) shall be discharged from any obligation or liability to the delinquent taxpayer and any other person with respect to such property or rights to property arising from such surrender or payment.

(f) Person defined.--The term "person," as used in subsection (a), includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to surrender the property or rights to property, or to discharge the obligation.

§ 6333. Production of books

If a levy has been made or is about to be made on any property, or right to property, any person having custody or control of any books or records, containing evidence or statements relating to the property or right to property subject to levy, shall, upon demand of the Secretary, exhibit such books or records to the Secretary.

§ 6334. Property exempt from levy

(a) Enumeration.--There shall be exempt from levy--

(1) Wearing apparel and school books.--Such items of wearing apparel and such school books as are necessary for the taxpayer or for members of his family;

(2) Fuel, provisions, furniture, and personal effects.--So much of the fuel, provisions, furniture, and personal effects in the taxpayer's household, and of the arms for personal use, livestock, and poultry of the taxpayer, as does not exceed $6,250 in value;

(3) Books and tools of a trade, business, or profession.--So many of

the books and tools necessary for the trade, business, or profession of the taxpayer as do not exceed in the aggregate $3,125 in value;

(4) Unemployment benefits.--Any amount payable to an individual with respect to his unemployment (including any portion thereof payable with respect to dependents) under an unemployment compensation law of the United States, of any State, or of the District of Columbia or of the Commonwealth of Puerto Rico.

(5) Undelivered mail.--Mail, addressed to any person, which has not been delivered to the addressee.

(6) Certain annuity and pension payments.--Annuity or pension payments under the Railroad Retirement Act, benefits under the Railroad Unemployment Insurance Act, special pension payments received by a person whose name has been entered on the Army, Navy, Air Force, and Coast Guard Medal of Honor roll (38 U.S.C. 1562), and annuities based on retired or retainer pay under chapter 73 of title 10 of the United States Code.

(7) Workmen's compensation.--Any amount payable to an individual as workmen's compensation (including any portion thereof payable with respect to dependents) under a workmen's compensation law of the United States, any State, the District of

Columbia, or the Commonwealth of Puerto Rico.

(8) Judgments for support of minor children.--If the taxpayer is required by judgment of a court of competent jurisdiction, entered prior to the date of levy, to contribute to the support of his minor children, so much of his salary, wages, or other income as is necessary to comply with such judgment.

(9) Minimum exemption for wages, salary, and other income.--Any amount payable to or received by an individual as wages or salary for personal services, or as income derived from other sources, during any period, to the extent that the total of such amounts payable to or received by him during such period does not exceed the applicable exempt amount determined under subsection (d).

(10) Certain service-connected disability payments.--Any amount payable to an individual as a service-connected (within the meaning of section 101(16) of title 38, United States Code) disability benefit under—

(A) subchapter II, III, IV, V, or VI of chapter 11 of such title 38, or

(B) chapter 13, 21, 23, 31, 32, 34, 35, 37, or 39 of such title 38.

(11) Certain public assistance payments.--Any amount payable to an individual as a recipient of public assistance under—

(A) title IV or title XVI (relating to supplemental security income for the aged, blind, and disabled) of the Social Security Act, or

(B) State or local government public assistance or public welfare programs for which eligibility is determined by a needs or income test.

(12) Assistance under Job Training Partnership Act.--Any amount payable to a participant under the Job Training Partnership Act (29 U.S.C. 1501 et seq.) from funds appropriated pursuant to such Act.

(13) Residences exempt in small deficiency cases and principal residences and certain business assets exempt in absence of certain approval or jeopardy.—

(A) Residences in small deficiency cases.--If the amount of the levy does not exceed $5,000--

(i) any real property used as a residence by the taxpayer; or

(ii) any real property of the taxpayer (other than real property which is rented) used by any other individual as a residence.

(B) Principal residences and certain business assets.--**Except to the extent provided in subsection (e)—**

(i) the principal residence of the taxpayer (within the meaning of section 121); and

(ii) tangible personal property or real property (other than real property which is rented) used in the trade or business of an individual taxpayer.

(b) Appraisal.--The officer seizing property of the type described in subsection (a) shall appraise and set aside to the owner the amount of such property declared to be exempt. If the taxpayer objects at the time of the seizure to the valuation fixed by the officer making the seizure, the Secretary shall summon three disinterested individuals who shall make the valuation.

(c) No other property exempt.--Notwithstanding any other law of the United States (including section 207 of the Social Security Act), no property or rights to property

shall be exempt from levy other than the property specifically made exempt by subsection (a).

(d) Exempt amount of wages, salary, or other income.--

(1) Individuals on weekly basis.--In the case of an individual who is paid or receives all of his wages, salary, and other income on a weekly basis, the amount of the wages, salary, and other income payable to or received by him during any week which is exempt from levy under subsection (a)(9) shall be the exempt amount.

(2) Exempt amount.--For purposes of paragraph (1), the term "exempt amount" means an amount equal to—

(A) the sum of—

(i) the standard deduction, and

(ii) the aggregate amount of the deductions for personal exemptions allowed the taxpayer under section 151 in the taxable year in which such levy occurs, divided by

(B) 52.

Unless the taxpayer submits to the Secretary a written and properly verified statement specifying the facts necessary to determine the proper

amount under subparagraph (A), subparagraph (A) shall be applied as if the taxpayer were a married individual filing a separate return with only 1 personal exemption.

(3) Individuals on basis other than weekly.--In the case of any individual not described in paragraph (1), the amount of the wages, salary, and other income payable to or received by him during any applicable pay period or other fiscal period (as determined under regulations prescribed by the Secretary) which is exempt from levy under subsection (a)(9) shall be an amount (determined under such regulations) which as nearly as possible will result in the same total exemption from levy for such individual over a period of time as he would have under paragraph (1) if (during such period of time) he were paid or received such wages, salary, and other income on a regular weekly basis.

(e) Levy allowed on principal residences and certain business assets in certain circumstances.--

(1) Principal residences.—

(A) Approval required.--A principal residence shall not be exempt from levy if a judge or magistrate of a district court of the United States approves (in writing) the levy of such residence.

(B) Jurisdiction.--The district courts of the United States shall have exclusive jurisdiction to approve a levy under subparagraph (A).

(2) Certain business assets.--Property (other than a principal residence) described in subsection (a)(13)(B) shall not be exempt from levy if—

(A) a district director or assistant district director of the Internal Revenue Service personally approves (in writing) the levy of such property; or

(B) the Secretary finds that the collection of tax is in jeopardy.

An official may not approve a levy under subparagraph (A) unless the official determines that the taxpayer's other assets subject to collection are insufficient to pay the amount due, together with expenses of the proceedings.

(f) Levy allowed on certain specified payments.--Any payment described in subparagraph (B) or (C) of section 6331(h)(2) shall not be exempt from levy if the Secretary approves the levy thereon under section 6331(h).

(g) Inflation adjustment.--

(1) In general.--In the case of any calendar year beginning after 1999, each dollar amount referred to in

paragraphs (2) and (3) of subsection (a) shall be increased by an amount equal to—

(A) such dollar amount, multiplied by

(B) the cost-of-living adjustment determined under section 1(f)(3) for such calendar year, by substituting "calendar year 1998" for "calendar year 1992" in subparagraph (B) thereof.

(2) Rounding.--If any dollar amount after being increased under paragraph (1) is not a multiple of $10, such dollar amount shall be rounded to the nearest multiple of $10.

§ 6335. Sale of seized property

(a) Notice of seizure.--As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale.--The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. Whenever levy is made without regard to the 10-day period provided in section 6331(a), public notice of sale of the property seized shall not be made within such 10-day period unless section 6336 (relating to sale of perishable goods) is applicable.

(c) Sale of indivisible property.--If any property liable to levy is not divisible, so as to enable the Secretary by sale of a part thereof to raise the whole amount of the tax and expenses, the whole of such property shall be sold.

(d) Time and place of sale.--The time of sale shall not be less than 10 days nor more than 40 days from the time of giving public notice under subsection (b). The place of sale shall be within the county in which the property is seized, except by special order of the Secretary.

(e) Manner and conditions of sale.--

(1) In general.--

(A) Determinations relating to minimum price.--Before the sale of property seized by levy, the Secretary shall determine--

(i) a minimum price below which such property shall not be sold (taking into account the expense of making the levy and conducting the sale), and

(ii) whether, on the basis of criteria prescribed by the Secretary, the purchase of such property by the United States at such minimum price would be in the best interest of the United States.

(B) Sale to highest bidder at or above minimum price.--If, at the sale, one or more persons offer to purchase such property for not less than the amount of the minimum price, the property shall be declared sold to the highest bidder.

(C) Property deemed sold to United States at minimum price in certain cases.-- If no person offers the amount of the

minimum price for such property at the sale and the Secretary has determined that the purchase of such property by the United States would be in the best interest of the United States, the property shall be declared to be sold to the United States at such minimum price.

(D) Release to owner in other cases.--If, at the sale, the property is not declared sold under subparagraph (B) or (C), the property shall be released to the owner thereof and the expense of the levy and sale shall be added to the amount of tax for the collection of which the levy was made. Any property released under this subparagraph shall remain subject to any lien imposed by subchapter C.

(2) Additional rules applicable to sale.--The Secretary shall by regulations prescribe the manner and other conditions of the sale of property seized by levy. If one or more alternative methods or conditions are permitted by regulations, the Secretary shall select the alternatives applicable to the sale. Such regulations shall provide:

(A) That the sale shall not be conducted in any manner other than—

(i) by public auction, or

(ii) by public sale under sealed bids.

(B) In the case of the seizure of several items of property, whether such items shall be offered separately, in groups, or in the aggregate; and whether such property shall be offered both separately (or in groups) and in the aggregate, and sold under whichever method produces the highest aggregate amount.

(C) Whether the announcement of the minimum price determined by the Secretary may be delayed until the receipt of the highest bid.

(D) Whether payment in full shall be required at the time of acceptance of a bid, or whether a part of such payment may be deferred for such period (not to exceed 1 month) as may be determined by the Secretary to be appropriate.

(E) The extent to which methods (including advertising) in addition to those prescribed

in subsection (b) may be used in giving notice of the sale.

(F) Under what circumstances the Secretary may adjourn the sale from time to time (but such adjournments shall not be for a period to exceed in all 1 month).

(3) Payment of amount bid.--If payment in full is required at the time of acceptance of a bid and is not then and there paid, the Secretary shall forthwith proceed to again sell the property in the manner provided in this subsection. If the conditions of the sale permit part of the payment to be deferred, and if such part is not paid within the prescribed period, suit may be instituted against the purchaser for the purchase price or such part thereof as has not been paid, together with interest at the rate of 6 percent per annum from the date of the sale; or, in the discretion of the Secretary, the sale may be declared by the Secretary to be null and void for failure to make full payment of the purchase price and the property may again be advertised and sold as provided in subsections (b) and (c) and this subsection. In the event of such readvertisement and sale any new purchaser shall receive such property or rights to property, free and clear of any claim or right of the former defaulting purchaser, of any nature whatsoever,

and the amount paid upon the bid price by such defaulting purchaser shall be forfeited.

(4) Cross reference.--For provision providing for civil damages for violation of paragraph (1)(A)(i), see section 7433.

(f) Right to request sale of seized property within 60 days.--The owner of any property seized by levy may request that the Secretary sell such property within 60 days after such request (or within such longer period as may be specified by the owner). The Secretary shall comply with such request unless the Secretary determines (and notifies the owner within such period) that such compliance would not be in the best interests of the United States.

(g) Stay of sale of seized property pending tax court decision.--For restrictions on sale of seized property pending Tax Court decision, see section 6863(b)(3).

§ 6336. Sale of perishable goods

If the Secretary determines that any property seized is liable to perish or become greatly reduced in price or value by keeping, or that such property cannot be kept without great expense, he shall appraise the value of such property and--

(1) Return to owner.--If the owner of the property can be readily found, the Secretary shall give him notice of such determination of the appraised value of the property. The property shall be returned to the owner if, within such

time as may be specified in the notice, the owner—

(A) Pays to the Secretary an amount equal to the appraised value, or

(B) Gives bond in such form, with such sureties, and in such amount as the Secretary shall prescribe, to pay the appraised amount at such time as the Secretary determines to be appropriate in the circumstances.

(2) Immediate sale.--If the owner does not pay such amount or furnish such bond in accordance with this section, the Secretary shall as soon as practicable make public sale of the property in accordance with such regulations as may be prescribed by the Secretary.

§ 6337. Redemption of property

(a) Before sale.--Any person whose property has been levied upon shall have the right to pay the amount due, together with the expenses of the proceeding, if any, to the Secretary at any time prior to the sale thereof, and upon such payment the Secretary shall restore such property to him, and all further proceedings in connection with the levy on such property shall cease from the time of such payment.

(b) Redemption of real estate after sale.--

(1) Period.--The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 180 days after the sale thereof.

(2) Price.--Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

(c) Record.--When any lands sold are redeemed as provided in this section, the Secretary shall cause entry of the fact to be made upon the record mentioned in section 6340, and such entry shall be evidence of such redemption.

§ 6338. Certificate of sale; deed of real property

(a) Certificate of sale.--In the case of property sold as provided in section 6335, the Secretary shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In

the case of real property, such certificate shall set forth the real property purchased, for whose taxes the same was sold, the name of the purchaser, and the price paid therefor.

(b) Deed to real property.--In the case of any real property sold as provided in section 6335 and not redeemed in the manner and within the time provided in section 6337, the Secretary shall execute (in accordance with the laws of the State in which such real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at such sale, upon his surrender of the certificate of sale, a deed of the real property so purchased by him, reciting the facts set forth in the certificate.

(c) Real property purchased by United States.--If real property is declared purchased by the United States at a sale pursuant to section 6335, the Secretary shall at the proper time execute a deed therefor, and without delay cause such deed to be duly recorded in the proper registry of deeds.

§ 6339. Legal effect of certificate of sale of personal property and deed of real property

(a) Certificate of sale of property other than real property.--In all cases of sale pursuant to section 6335 of property (other than real property), the certificate of such sale--

(1) As evidence.--Shall be prima facie evidence of the right of the officer to make such sale, and conclusive evidence of the regularity of his proceedings in making the sale; and

(2) As conveyances.--Shall transfer to the purchaser all right, title, and interest of the party delinquent in and to the property sold; and

(3) As authority for transfer of corporate stock.--If such property consists of stocks, shall be notice, when received, to any corporation, company, or association of such transfer, and shall be authority to such corporation, company, or association to record the transfer on its books and records in the same manner as if the stocks were transferred or assigned by the party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not; and

(4) As receipts.--If the subject of sale is securities or other evidences of debt, shall be a good and valid receipt to the person holding the same, as against any person holding or claiming to hold possession of such securities or other evidences of debt; and

(5) As authority for transfer of title to motor vehicle.--If such property consists of a motor vehicle, shall be notice, when received, to any public official charged with the registration of title to motor vehicles, of such transfer and shall be authority to such official to record the transfer on his books and records in the same manner as if the certificate of title to such motor vehicle were transferred or assigned by the

party holding the same, in lieu of any original or prior certificate, which shall be void, whether canceled or not.

(b) Deed of real property.--In the case of the sale of real property pursuant to section 6335--

(1) Deed as evidence.--The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) Deed as conveyance of title.--If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

(c) Effect of junior encumbrances.--A certificate of sale of personal property given or a deed to real property executed pursuant to section 6338 shall discharge such property from all liens, encumbrances, and titles over which the lien of the United States with respect to which the levy was made had priority.

(d) Cross references.--

(1) For distribution of surplus proceeds, see section 6342(b).

(2) For judicial procedure with respect to surplus proceeds, see section 7426(a)(2).

§ 6340. Records of sale

(a) Requirement.--The Secretary shall, for each internal revenue district, keep a record of all sales of property under section 6335 and of redemptions of such property. The record shall set forth the tax for which any such sale was made, the dates of seizure and sale, the name of the party assessed and all proceedings in making such sale, the amount of expenses, the names of the purchasers, and the date of the deed or certificate of sale of personal property.

(b) Copy as evidence.--A copy of such record, or any part thereof, certified by the Secretary shall be evidence in any court of the truth of the facts therein stated.

(c) Accounting to taxpayer.--The taxpayer with respect to whose liability the sale was conducted or who redeemed the property shall be furnished—

(1) the record under subsection (a) (other than the names of the purchasers);

(2) the amount from such sale applied to the taxpayer's liability; and

(3) the remaining balance of such liability.

§ 6341. Expense of levy and sale

The Secretary shall determine the expenses to be allowed in all cases of levy and sale.

§ 6342. Application of proceeds of levy

(a) Collection of liability.--Any money realized by proceedings under this subchapter

(whether by seizure, by surrender under section 6332 (except pursuant to subsection (c)(2) thereof), or by sale of seized property) or by sale of property redeemed by the United States (if the interest of the United States in such property was a lien arising under the provisions of this title) shall be applied as follows:

(1) Expense of levy and sale.--First, against the expenses of the proceedings;

(2) Specific tax liability on seized property.--If the property seized and sold is subject to a tax imposed by any internal revenue law which has not been paid, the amount remaining after applying paragraph (1) shall then be applied against such tax liability (and, if such tax was not previously assessed, it shall then be assessed);

(3) Liability of delinquent taxpayer.--The amount, if any, remaining after applying paragraphs (1) and (2) shall then be applied against the liability in respect of which the levy was made or the sale was conducted.

(b) Surplus proceeds.--Any surplus proceeds remaining after the application of subsection (a) shall, upon application and satisfactory proof in support thereof, be credited or refunded by the Secretary to the person or persons legally entitled thereto.

§ 6343. Authority to release levy and return property

(a) Release of levy and notice of release.--

(1) In general.--Under regulations prescribed by the Secretary, the Secretary shall release the levy upon all, or part of, the property or rights to property levied upon and shall promptly notify the person upon whom such levy was made (if any) that such levy has been released if--

(A) the liability for which such levy was made is satisfied or becomes unenforceable by reason of lapse of time,

(B) release of such levy will facilitate the collection of such liability,

(C) the taxpayer has entered into an agreement under section 6159 to satisfy such liability by means of installment payments, unless such agreement provides otherwise,

(D) the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer, or

(E) the fair market value of the property exceeds such liability and release of the levy on a part of such property could be made

without hindering the collection of such liability.

For purposes of subparagraph (C), the Secretary is not required to release such levy if such release would jeopardize the secured creditor status of the Secretary.

(2) Expedited determination on certain business property.--In the case of any tangible personal property essential in carrying on the trade or business of the taxpayer, the Secretary shall provide for an expedited determination under paragraph (1) if levy on such tangible personal property would prevent the taxpayer from carrying on such trade or business.

(3) Subsequent levy.--The release of levy on any property under paragraph (1) shall not prevent any subsequent levy on such property.

(b) Return of property.--If the Secretary determines that property has been wrongfully levied upon, it shall be lawful for the Secretary to return--

(1) the specific property levied upon,

(2) an amount of money equal to the amount of money levied upon, or

(3) an amount of money equal to the amount of money received by the United States from the sale of such property.

Property may be returned at any time. An amount equal to the amount of money levied upon or received from such sale may be returned at any time before the expiration of 9 months from the date of such levy. For purposes of paragraph (3), if property is declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount of money equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(c) Interest.--Interest shall be allowed and paid at the overpayment rate established under section 6621--

(1) in a case described in subsection (b)(2), from the date the Secretary receives the money to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days, or

(2) in a case described in subsection (b)(3), from the date of the sale of the property to a date (to be determined by the Secretary) preceding the date of return by not more than 30 days.

(d) Return of property in certain cases.--If--

(1) any property has been levied upon, and

(2) the Secretary determines that--

(A) the levy on such property was premature or otherwise not in accordance with administrative procedures of the Secretary,

(B) the taxpayer has entered into an agreement under section 6159 to satisfy the tax liability for which the levy was imposed by means of installment payments, unless such agreement provides otherwise,

(C) the return of such property will facilitate the collection of the tax liability, or

(D) with the consent of the taxpayer or the National Taxpayer Advocate, the return of such property would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States, the provisions of subsection (b) shall apply in the same manner as if such property had been wrongly levied upon, except that no interest shall be allowed under subsection (c).

(e) Release of levy upon agreement that amount is not collectible.--In the case of a levy on the salary or wages payable to or received by the taxpayer, upon agreement with the taxpayer that the tax is not collectible, the Secretary shall release such levy as soon as practicable.

§ 6344. Cross references

(a) Length of period.--For period within which levy may be begun in case of—

(1) Income, estate, and gift taxes, and taxes imposed by chapter 41, 42, 43, or 44, see sections 6502(a) and 6503(a)(1).

(2) Employment and miscellaneous excise taxes, see section 6502(a).

(b) Delinquent collection officers.--For distraint proceedings against delinquent internal revenue officers, see section 7804(c).

(c) Other references.--For provisions relating to--

(1) Stamps, marks and brands, see section 6807.

(2) Administration of real estate acquired by the United States, see section 7506.

D. 26 U.S.C. § 7433 (2004):

(a) In general.--If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. Except as provided in section 7432, such civil action shall be the

exclusive remedy for recovering damages resulting from such actions.

(b) Damages.--In any action brought under subsection (a) or petition filed under subsection (e), upon a finding of liability on the part of the defendant, the defendant shall be liable to the plaintiff in an amount equal to the lesser of $1,000,000 ($100,000, in the case of negligence) or the sum of--

(1) actual, direct economic damages sustained by the plaintiff as a proximate result of the reckless or intentional or negligent actions of the officer or employee, and

(2) the costs of the action.

(c) Payment authority.--Claims pursuant to this section shall be payable out of funds appropriated under section 1304 of title 31, United States Code.

(d) Limitations.--

(1) Requirement that administrative remedies be exhausted.--A judgment for damages shall not be awarded under subsection (b) unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the Internal Revenue Service.

(2) Mitigation of damages.--The amount of damages awarded under subsection (b)(1) shall be reduced by the amount of such damages which

could have reasonably been mitigated by the plaintiff.

(3) Period for bringing action.--Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues.

(e) Actions for violations of certain bankruptcy procedures.--

(1) In general.--If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to automatic stay) or 524 (relating to effect of discharge) of title 11, United States Code (or any successor provision), or any regulation promulgated under such provision, such taxpayer may petition the bankruptcy court to recover damages against the United States.

(2) Remedy to be exclusive.—

(A) In general.--Except as provided in subparagraph (B), notwithstanding section 105 of such title 11, such petition shall be the exclusive remedy for recovering damages resulting from such actions.

(B) Certain other actions permitted.--Subparagraph (A) shall not apply to an action under section 362(h) of such title 11 for a violation of a stay provided by section 362 of such title; except that—

(i) administrative and litigation costs in connection with such an action may only be awarded under section 7430; and

(ii) administrative costs may be awarded only if incurred on or after the date that the bankruptcy petition is filed.

(8)

APR 11 2005

No. 04-603

IN THE

Supreme Court of the United States

GRABLE & SONS METAL PRODUCTS, INC.,
A Michigan corporation,
Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING,
A Michigan corporation,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF ON THE MERITS

CHARLES E. MCFARLAND *
338 Jackson Road
New Castle, KY
(502) 845-2754

* Counsel of Record

Attorney for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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PETITIONER'S REPLY TO BRIEF FOR RESPONDENT

A. Introduction.

The Respondent's Response Brief on the Merits has not accurately perceived the critical aspect in which The 6th Circuit departed from the standards set forth by *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808, 106 S. Ct. 3229, 3232, 92 L. Ed. 2d 650 (1986). Petitioner's state complaint closely follows virtually similar circumstances as in *Merrell Dow*. Under *Merrell Dow* substantial federal question jurisdiction is not available when there is no private right of action provided by Congress for relief of a violation of federal law as alleged in the complaint. Respondent seeks to deviate from the *Merrell Dow* rule and follow a line of cases that are at their nature are constitutional or conflict between federal statutes issues.

B. Recap of Question for Review.

Petitioner petitioned the Supreme Court for a writ of certiorari the Supreme Court to address two issues. The first issue addressed the federal court's jurisdiction and is as follows:

> "The question raised is, when there is a violation by the IRS of 26 U.S.C. §6335(a) by intentionally ignoring the prerequisite provision requiring personal service of notice of seizure before obtaining service by certified mail, whether the defendant in a state quiet title action can remove the action by claiming that the necessary interpretation of 26 U.S.C. §6335(a) as to whether strict compliance or substantial compliance with the statute constitutes a substantial federal question and creates original jurisdiction in the district court."

The Federal question issue is a result of both the District Court and the Sixth Circuit's failure to correctly apply the *Merrell*

Dow rule for original jurisdiction which resulted in the 6th Circuit establishing ruling that a mere violation of a federal law was sufficient to establish a substantial federal question thereby giving the federal court original jurisdiction. This is the only question this Court certified for review.

The second issue sought for review addressed the question of whether requirement in 26 U.S.C. §6335(a) of personal service of notice of seizure (or leaving the notice at the place of abode or business) before the IRS can obtain service through certified mail should be subject to strict compliance or should the requirement be subject to the substantial compliance standards found in 26 U.S.C. §6339(b)(2). This Court declined to certify the compliance standard issue.

C. Petitioner's Complaint as Governed by Merrell Dow.

The essence of Petitioners complaint is that a cloud of title is on its real estate title because Respondent acquired a quit claim of the property through an alleged tax sale wherein requirements for service of the notice of seizure were violated by the IRS thereby making the sale void *ab initio* and the subsequent quit claim deed provided by the IRS to Respondent also void *ab initio*. Thus, the complaint is one where the allegation of a federal requirement is the principal basis of the state cause of action.

Merrell Dow, supra, 478 U.S. at 808, was also a case in which a federal standard (requirement) was the principal basis for the state cause of action. The question considered in *Merrell* Dow supra 478 U.S. at 805, was,

> "The question presented is whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for violations of that federal standard, makes the action one 'arising under the

> Constitution, laws, or treaties of the United States."

The holding in *Merrell* Dow supra 478 U.S. at 817, was,

> "We conclude that a complaint alleging a violation of a federal statute as an element of a state cause of action, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim 'arising under the Constitution, laws, or treaties of the United States."

The *Merrell Dow* case and this case are virtually identical in principle. Petitioner alleged that the IRS violated the federal standard in 26 U.S.C. §6335(a) of not serving the owner of property with personal service (or leaving at the place or abode or business) of a notice of seizure. Congress has not provided a private quiet title action to remove a cloud on the title by a third party. *Merrell Dow* expressly holds that absent a private federal cause of action the mere presence of an allegation of the violation of a federal statute in a state complaint is not sufficient to usher in federal court jurisdiction through a substantial federal question. In this case the result should be the same as the one in *Merrell Dow*.

D. Analysis of *Merrell Dow* Refutes Respondent's Arguments.

1. Foundation of *Merrell Dow* Reasoning.

The standards and reasons that this Court used in *Merrell Dow* are inapposite to the reasoning of the Respondent it Merits Brief. In *Merrell Dow* this Court emphasized that, in addressing outer reaches of 28 U.S.C.

§1331, i.e. the question of federal jurisdiction and the 'arising under' language, the requirement of "sensitive judgments about congressional intent, judicial power and the federal system" were necessary, *Merrell Dow*, *id*, at 810. In order to render these judgments the proper conclusion necessarily depends on some combination of the following:

(1) "the plaintiff's are not part of the class for whose benefit the statute was passed;
(2) the indica of legislative intent reveal no congressional purpose to provide a private cause of action;
(3) a federal cause of action would not further the underlying purpose of the legislative scheme; and
(4) the respondent's cause of action is a subject traditionally regulated to state law, " *id*, at 810-811.

The Court noted that the factual elements in *Merrell Dow* presented the first case in which this Court reviewed a jurisdictional claim in light of the foregoing factors.

In reaching its final decision that absent a private federal action created by Congress there was no removal jurisdiction the Court examined previous case law. It initially considered *American Well Works Company v Lyne & Bowler Company*, 241 U.S. 987, 60 L.Ed 987, 36 S.Ct. 585 (1916), and the test Justice Holmes established for determining under what law a suit arises. His simple, but profound observation was, "A suit arises under the law that creates the cause of action." The Court, however, concluded that it was not an all inclusive test. The Court noted that in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 9, 13 77 L.ED2d 420, 193 S.Ct. 2841 (1983), *id*, at 808. that a federal question may arise if there is a vindication of a right under federal law if that right turned on some construction of federal law. But, according to the Court "this statement must be read with caution," *id*, at 809.

The full statement in *Franchise Tax Board*, is

> "Our concern in this case is consistent application of a system of statutes conferring original federal-court jurisdiction, as they have been interpreted by this Court over many years. Under our interpretations, Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either, that the federal law creates the cause of action, or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law," *Franchise Tax Board*, 463 U.S. at 27-28

The Holmes analysis clearing indicates that the first standard does not apply because the compliant in both *Merrell Dow* and this case arose under state law. But it does not address the second standard where "The right to relief necessarily depends on resolution of a substantial question of federal law"

After determining that the second standard of a substantial federal question appearing in the well-pleaded complaint was the one before it, the *Merrell Dow* Court applied the four factors. In its view the Court stated the fact that "there is no federal private right of action thus cannot be overstated," *Merrell Dow*, supra 478 U.S. at 812. The ultimate conclusion was that creating a federal cause of action where there is none would 'flout' Congressional intent. Thus, the holding that absent a private federal right of action, the allegation of a violation of a federal statute in a state created cause of action is not sufficiently substantial to support substantial federal question jurisdiction removal from state court to federal court.

2. Arguments Contrary to *Merrell Dow.*

a. Application of *Franchise Tax Board.*

The Petitioner in *Merrell Dow* raised three arguments similar to the ones raised in this case by Respondent, the first two of which are similar to the ones argued by both the Respondent and the United States. The third is not applicable in this case. First, the argument was raised that the question before the Court was really a straightforward application of *Franchise Tax Board.* The Respondent in this case raised the virtually the same issue thought its reliance on the *Smith v. Kansas City Title & Trust Co.* 255 U.S. 180, 65 L.Ed 577, 41 S.Ct. 245 (1921) line of cases.

Merrell Dow addressed this argument by pointing out that the process of determining substantial federal question jurisdiction was a "selective process which picks out the substantial causes out of the web and lays the other ones aside," *Merrell Dow*, supra 478 U.S. at 815. As part of the 'selective process' the Court determined,

> "We simply conclude that the congressional determination that there should be no deferral remedy for the violation of this federal statute is tantamount to a congressional conclusion that that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction," *Merrell Dow*, supra 478 U.S. at 815.

In reaching this conclusion the Court in footnote 12, *id.* at 814, n12, effectively distinguished *Smith* on the basis that it was a question of the constitutionality of a federal statute. In other words, the 'selection process' used by the Court found that a constitutional question of a federal law

was consistent with a substantial federal question while an allegation of a violation of a federal law was not sufficient to be a substantial federal question jurisdiction.

The Respondent relies heavily in three cases, *Hopkins v. Walker*, 244 U.S. 486, 61 L.Ed 1270, 37 S.Ct. 711 (1917); *Smith v. Kansas City*, supra; and *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 100 L.Ed2d 811, 108 S.Ct. 2166 (1988). These are all in the same case line and are not applicable to this case by virtue of the holding in *Merrell Dow*. The *Smith* case is not applicable as shown above.

The *Hopkins* case is also not applicable to this case. *Hopkins* is a case in which the owners of a placer claim in Montana filed to remove a cloud on the title to their property for which a United States patent was issued to their predecessors. The owners had followed the mining laws of the United States and had obtained judgments affirming their ownership. Under a mistaken theory of the mining law adverse owners also applied for and received United States patents for the same property. The issue, and the facts surrounding it, concerning the conflict in the United States mining laws that resulted in two separate patents being placed on the same property was made part of the complaint.

The *Hopkins* case did not turn on its being a suit to remove title or a quiet title as the Respondent suggest, but on "the nature and validity of the plaintiff's title and the existence, invalidity, and recording of the defendants' certificates of location," *Hopkins*, supra, 244 U.S. at 489, which were a part of the complaint. As a result the court found that the case arose under the laws of the United States. This conclusion is consistent with the 'selective process' used by *Merrell Dow*. The allegation of a conflict between two federal statutes is a substantial question.

Respondent relies on the *Christianson* case, but that case did not deal with raising a violation of federal law to the status of a substantial federal question. In fact, in *Christianson* this Court found there was no jurisdiction for an appeal to the Federal Circuit because the patent law allegations were not included in each of the theories of antitrust claims as alleged by the petitioner. While these cases did correctly address various aspects of the "well-pleaded complaint' doctrine, they did not address the mere violation of a federal statute issue which are the focal point of both *Merrell Dow* and this case. Accordingly, any reliance by the Respondent on these cases and their subsequent lines is misplaced. It should be noted that the crux of the United States argument in it *amicus* brief revolves around the same line of cases.

b. Alleged Need for Federal Uniformity.

The second argument raised by the petitioner in *Merrell Dow* contended that there is a "powerful federal interest in seeing that the federal statute is given uniform interpretation. The Court dismissed such an argument by stating that "even if there is no federal district court jurisdiction for these kinds of action, this Court retains power to review the decision of a federal issue in a state cause of action," *Merrell Dow*, supra 478 U.S. at 816.

This is the same argument the United States raised in its *amicus* brief. The United States position is undercut by three things, 1.) the position in *Merrell Dow* that the Supreme Court has ultimate appellate jurisdiction; 2.) case law of which an example is *Smith v. Industrial Valley Title Ins.*, 957 F.2d 90, 94 (3rd Cir. 1992) (following *Merrell Dow* and finding that Pennsylvania court were competent to interpret the Revenue Code); and 3.) the United States own position on 26 U.S.C. §6339(b)(2).

The *Smith v. Industrial Valley Title Ins.*, supra, is an excellent example of an appellate court correctly applying the requirement of a private right of action rule to a tax statute, by following *Merrell Dow* and finding no substantial federal question jurisdiction for removal purposes.

The United States also claims that it has a significant interest in the development of a uniform body of law. Because of this significant interest it believes that cases such as this one should be litigated in federal court to preserve that uniformity. While the United States appears to claim an interest in promoting uniformity through federal court litigation, its position is contrary to what it understands the mandate of Congress to be in 26 U.S.C. §6339(b)(2).

At page 26 in its *amicus* brief the United States clearly states its position,

> "In contrast, because Congress has *required federal tax sale requirements to be applied in state law quiet title actions*, see 26 U.S.C. §6339(b)(2), Congress's failure to create a federal cause of action to enforce the federal requirements is not evidence of the absence of a substantial federal interest in how those requirements are applied. To the contrary, the *very fact that Congress has mandated the application of federal requirements in state quiet title actions* establishes a substantial federal interest in actions that depend on the meaning or effect of those requirements." See United States *amicus* Brief, at page 26. (Emphasis added)

It is simply illogical for the United States to argue for a removal of a state quiet title action to federal court on the basis of a substantial federal question based on the

interpretation and effect of 26 U.S.C. §6339(b)(2) on section 6335 and maintain at the same time that Congress mandated the state courts to apply the federal law in state quiet title actions.

E. Respondent's Alternative Argument.

In its Summary of Argument at page 10 of its Brief the Respondent alternatively argues that Congress provided an express cause of action for which Petitioner could have pursued. Respondent later argued that 26 U.S.C. §7433 was an avenue by which Congress provided Petitioner with a private cause of action for damages. There are at least two reasons why the Respondent's assessment is incorrect.

First section 7433 provides a remedy for damages against the United States, but not for a quiet title action against a third party. There is nothing in the IR Code or US code that gives Petitioner the cause of action of quiet title against another private party. This can only be done through state law. There is at least one district court case that indicates there is no federal remedy for a violation of section 6335. In *Little River Farms, Inc. v. United States*, 328 F.2d 476, 479 (ND Georgia, 1971). That court found that the owner under section 6335 has no way to enforce a violation under section 6335, except for 28 U.S.C. §2410. This is a private suit between two parties over property which the United States has stated it has no interest. Thus, Section 2410 is not applicable here because the quiet title is against the United States which must claim an interest in the property.

Second, assuming *arguendo*, a suit for damages would satisfy the requirement of a private cause of action in this case, it still is inapplicable. Even if Congress did create a private federal action the lower courts have consistently held that if the plaintiff is barred from pursuing the action, either substantively or procedurally there is no federal jurisdiction

over a state cause of action based on a violation of that law, see *Dixon v. Coburg Dairy, Inc.* 369 F.3d 811 (4th Cir, 2004); *Jairath v. Dyer*, 154 F3d 1280, 1283 & n9 (11th Cir. 1998); *Seinfeld v. Austin*, 39 F.3d 761, 764 n3 (7th Cir. 1994); and *Mulcahy v. Columbia Organic Chem. Co.*, 29 F.3d 148, 152 (4th Cir. 1994). In essence, these cases say that if the federal private right of action is unavailable for any reason, a private federal cause of action under *Merrell Dow* does not exist. Section 7433(d)(3) provides for a two year statute of limitations. Thus, the private right of action advocated by the Respondent does not exist in this case.

Furthermore, assuming one again *arguendo*, the case law is clear that the federal remedy must match the remedy sought, see *Mulcahy*, supra, 29 F. 3d at 152-53 (federal remedy available did not provide the requested monetary damages so "a private cause of action under Merrell Dow does not, in truth, exist"); *Wander v. Kaus*, 304 F. 3d 856, 859 (9th Cir. 2002) (remanding claim for damages under a state law which incorporated a violation of the federal Americans with Disabilities Act as a violation of state law, because the only federal remedy available was for injunctive relief rather than compensatory damages); *Jairath*, supra, 154 F. 3d at 1284; *Handyman Network, Inc. v. Westinghouse Savannah River*, 868 F.Supp. 151, 154 (D.S.C. 1994) (Remanding state tort and contract claims premised on violations of federal wage and benefits laws and seeking compensatory damages, noting that no private federal remedy for compensatory damages is available); and *In re Wireless Telephone Radio Frequency Emissions Products Liab. Litig.*, 327 F. Supp. 2d 554, 558-59 (D. Md. 2004) (noting no federal remedy available to plaintiffs providing requested monetary damages for personal injuries and remanding to state court).

H. Conclusion.

The Petitioner filed a complaint in state court merely alleging a violation of 26 U.S.C. §6335(a), hence a need to interpret the statute. In so doing Petitioner did not allege that the statute was unconstitutional, that it was invalid, nor that it was in conflict with another federal statute. By merely alleging a violation of federal law Petitioner did not invoke the substantial federal issues of constitutionality and statutory conflicts which the *Smith v. Kansas* line of cases address. Rather it placed its complaint squarely within the parameters meant to be resolved by *Merrell Dow as* the 3rdCircuit has held in *Smith v. Industrial Valley*.

Both the District Court and the 6th Circuit found federal jurisdiction by violating the requirement of a private federal right of action. The holding in *Merrell Dow* is clear and unequivocal. When there is an allegation of a violation of a federal statute in a state cause of action there must be a private federal remedy provided by Congress. If there is not, there is no federal jurisdiction through substantial federal question jurisdiction. This case has the same elements, an allegation of the violation of a federal statute 26 U.S.C. §6335(a)) and no private right of action to enforce that violation. Thus, substantial federal question jurisdiction should be denied as it was in *Merrell* Dow. The decision of the 6th Circuit must be reversed with the case being remanded back to the district court with instructions to remand the case to the Michigan courts where the quiet title action belongs.

April 11, 2005

Respectfully submitted,
Charles E. McFarland
Counsel for the Petitioner
338 Jackson Road
New Castle, KY
(502) 845-2754

No. 04-603

In the Supreme Court of the United States

GRABLE & SONS METAL PRODUCTS, INC., PETITIONER

v.

DARUE ENGINEERING & MANUFACTURING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

GILBERT S. ROTHENBERG
TERESA E. MCLAUGHLIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a quiet title action brought by a taxpayer in state court against the purchaser of property at a federal tax sale arises under federal law and is therefore removable to federal court when the taxpayer's right to relief depends on its allegation that the purchaser's federal tax deed is invalid because the Secretary of the Treasury failed to serve the taxpayer with notice of the property's seizure in accordance with 26 U.S.C. 6335.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether a quiet title action brought by a taxpayer in state court against the purchaser of property at a federal tax sale arises under federal law and is therefore removable to federal court when the taxpayer's right to relief depends on its allegation that the purchaser's federal tax deed is invalid because the Secretary of the Treasury failed to serve the taxpayer with notice of the property's seizure in accordance with 26 U.S.C. 6335. The United States has a substantial interest in the resolution of that question.

The Secretary of the Treasury, through the Internal Revenue Service (IRS), has the authority to administer

the internal revenue laws. Pursuant to that authority, the Secretary has the power and responsibility to seize and sell property to satisfy delinquent tax liabilities. 26 U.S.C. 6331. As a result, the United States has a significant interest in the development of a uniform body of law governing the validity of federal tax sales and the resulting transfer of property to purchasers at such sales. Permitting cases raising such issues to be litigated in federal court promotes the development of such a uniform body of law and furthers the government's interest in the "prompt and certain collection of delinquent taxes." *United States* v. *Rodgers*, 461 U.S. 677, 709 (1983). The United States' interest in this case is heightened because the United States itself is potentially subject to a quiet title action under 28 U.S.C. 2410, a contract action under 28 U.S.C. 1346, or a damages action under 26 U.S.C. 7433, if IRS officials fail to comply with the requirements of federal law that relate to the seizure and sale of property to satisfy delinquent tax liabilities.

The United States also has an interest in this case because it was sued as a third party defendant in the district court. In that capacity, the United States argued in the district court that the tax sale in this case validly transferred title to respondent.

STATEMENT

1. If a person liable for taxes fails to pay them after demand, the United States acquires a lien on all property belonging to that person for the amount of taxes owed. 26 U.S.C. 6321. If the person fails to pay the amount owed within ten days after notice and demand, the Secretary of the Treasury (Secretary) may recover the tax by levy upon all property belonging to that person. 26 U.S.C. 6331(a). In any case in which the

Secretary may levy, the Secretary may seize and sell the property that is subject to levy. 26 U.S.C. 6331(b).

As soon as practical after seizure of the property, "notice in writing shall be given by the Secretary to the owner of the property" or "left at his usual place of abode or business" if he has one within the revenue district where the seizure is made. 26 U.S.C. 6335(a). If the owner cannot be readily located, or has no dwelling or place of business within the applicable revenue district, the notice may be mailed to his last known address. 26 U.S.C. 6335(a). As soon as practical after seizure of the property, the Secretary is required to give the owner notice of the sale in the same manner. 26 U.S.C. 6335(b). The Secretary is also required to give notice to the public of the sale of the property. That notice must specify the property to be sold, and the time, place, manner, and conditions of the sale. 26 U.S.C. 6335(b).

The owner of property sold at a tax sale may redeem the property within 180 days of the sale. 26 U.S.C. 6337(b)(1). To redeem the property, the taxpayer must pay the purchase price plus interest at a rate of 20% per year. 26 U.S.C. 6337(b)(2).

When property is sold under 26 U.S.C. 6335, the Secretary gives the purchaser a certificate of sale upon payment of the purchase price. 26 U.S.C. 6338(a). If the property is sold and not redeemed after 180 days, the Secretary executes a federal tax deed to the purchaser. 26 U.S.C. 6338(b). The deed is "prima facie evidence of the facts therein stated." 26 U.S.C. 6339(b)(1). If the tax levy and sale proceedings "have been substantially in accordance with the provisions of law," the deed operates "as a conveyance of all the right, title, and interest the party delinquent had in and to the real property." 26 U.S.C. 6339(b)(2).

2. a. Grable & Sons Metal Products, Inc. (petitioner) failed to pay its income taxes for six years. Pet. App. 3. In 1994, the IRS seized property at 601-701 West Plains Road, in Eaton Rapids, Michigan to satisfy petitioner's tax debt. *Ibid.* The IRS served petitioner with notice of the seizure by certified mail. *Ibid.* Petitioner received actual notice of the seizure and sale of the property. *Id.* at 3, 16.

On December 13, 1994, the IRS sold the West Plains Road property at a tax sale to Darue Engineering & Manufacturing (respondent). Pet. App. 3. Petitioner did not attempt to redeem the property. *Ibid.* On November 13, 1995, the IRS executed a deed to respondent conveying petitioner's interest in the property. *Ibid.*

Approximately six years later, petitioner filed a quiet title action against respondent in the Circuit Court for Eaton County, Michigan. Pet. App. 3. Petitioner alleged that he was the owner of the West Plains Road property and that there was a cloud on his title due to the federal tax deed to the property that respondent had acquired from the IRS in the federal tax sale. Br. in Opp. App. 2, at 2A-4A. Petitioner further alleged that respondent's deed "is invalid" because it "was given with improper notice pursuant to 26 U.S.C. 6331, et seq." *Id.* at 4A. Petitioner alleged that notice was not served as required because "it was not given to it or was not left at the usual place of abode or business that existed within the Internal Revenue District where the seizure was made." *Ibid.* Petitioner further alleged that "since the tax deed was given pursuant to improper notice as required by 26 USC 6335(a), said transfer and claim through the tax deed is null and void and void ab initio." *Ibid.* Petitioner sought as relief

that respondent "be ordered to have no right, title or interest" in the West Plains Road property. *Ibid.*

b. Pursuant to 28 U.S.C. 1441, respondent filed a notice of removal of the action to the United States District Court for the Western District of Michigan. Pet. App. 3. Section 1441 authorizes removal of a civil action "of which the district courts of the United States have original jurisdiction." 28 U.S.C. 1441(a). When district courts have original jurisdiction founded on a claim arising under federal law, the action is removable "without regard to the citizenship or residence of the parties." 28 U.S.C. 1441(b). Respondent argued that petitioner's claim arises under federal law because petitioner's right to relief depends on its allegation that the failure to give notice as required by 26 U.S.C. 6335(a) invalidates respondent's deed. Pet. App. 15.

Petitioner moved to remand the case to state court for lack of federal subject matter jurisdiction. Pet. App. 3. The district court denied the motion. *Id.* at 12-13. The court reasoned that a federal claim is apparent on the face of petitioner's complaint because petitioner's claim that respondent's deed is invalid rests "expressly and exclusively" on its assertion that the IRS failed to comply with the notice requirements of 26 U.S.C. 6335(a). Br. in Opp. App. 1, at 13A.

Respondent filed a third-party complaint against the United States, seeking to hold the United States liable for respondent's damages should respondent's deed be declared invalid. Pet. App. 15. The government moved to dismiss the third-party complaint based on sovereign immunity. *Ibid.*

The district court upheld the validity of respondent's deed. Pet. App. 18-19. The court reasoned that, under Section 6339(b)(2), substantial compliance with the notice requirements of Section 6335 is sufficient to

transfer title in a tax sale and that there was substantial compliance in this case because petitioner received actual notice of the seizure of its property through certified mail. *Ibid.* The court also ruled that petitioner was not entitled to equitable relief because it had offered no explanation for its six-year delay in filing suit. *Id.* at 19-20. Having upheld the validity of respondent's deed, the court dismissed respondent's third-party complaint against the United States as moot. *Id.* at 20.

3. The court of appeals affirmed. Pet. App. 1-11. The court held that the district court had jurisdiction because petitioner's suit arises under federal law. The court reasoned that while petitioner's cause of action is derived from state law, petitioner's entitlement to relief depends on federal law. The court explained that "the only way to resolve the underlying controversy is to evaluate whether § 6335(a), which mandates notice for IRS seizure of property for non-payment of taxes in person, requires strict, or merely substantial, compliance with its provisions to allow the IRS deed to convey title." *Id.* at 6. The court also concluded that there is a substantial federal interest in having a federal court resolve that issue. *Id.* at 5. The court emphasized that "[t]he IRS must have transparent procedures for seizing and selling property so that people will be willing to purchase property at tax sales, allowing the IRS to provide a predictable stream of tax revenue." *Ibid.*

On the merits, the court of appeals affirmed the district court's grant of summary judgment in respondent's favor. Pet. App. 7-11. The court held that, under Section 6339(b), if the IRS substantially complies with the notice requirements of Section 6335(a), a tax sale is valid. *Id.* at 7-8. The court also held that there was

substantial compliance in this case because petitioner received actual notice of the seizure and sale, had not alleged any prejudice, and had waited for six years before filing suit. *Id.* at 10. The court of appeals further held that, in light of petitioner's delay in filing suit, the district court had appropriately relied on equitable principles in denying petitioner relief. *Id.* at 11.

4. Petitioner filed a petition for a writ of certiorari raising the question whether the district court had jurisdiction over its suit as well as the question whether strict compliance with Section 6335(a) is necessary to transfer valid title in a tax sale. The Court granted a writ of certiorari limited to the first question.[1]

SUMMARY OF ARGUMENT

An action arises under federal law when the plaintiff's right to relief under a state law cause of action necessarily depends on the resolution of a substantial question of federal law. Petitioner's right to relief under its state law cause of action necessarily depends on its allegation that respondent's deed is invalid because IRS officials failed to conduct a federal tax sale in accordance with the notice requirements in 26 U.S.C. 6335. Petitioner's action therefore arises under federal law.

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[1] Because the Court did not grant certiorari on the question whether strict compliance with Section 6335(a) is necessary to transfer valid title, we do not address that question in this brief. The position of the United States is that the court of appeals correctly resolved that question, and that petitioner's contrary view of the law, if adopted by a court, would create substantial administrative difficulties for the IRS and the Department of Justice in the collection of tax revenues.

In *Hopkins* v. *Walker*, 244 U.S. 486 (1917), the Court held that a quiet title action arose under federal law when the plaintiffs' right to relief depended on their allegation that the defendants' claims to title were invalid under federal law. Four other decisions of this Court have similarly held that a suit arises under federal law when the plaintiff seeks to establish superior title under state law, and the plaintiff's right to relief depends on federal law. That line of decisions confirms that petitioner's action arises under federal law.

In order for a claim to arise under federal law, the meaning or effect of federal law must be disputed. That condition is satisfied in this case. The underlying facts are not disputed: The parties agree that IRS officials did not personally serve petitioner with notice of seizure. But the parties dispute the legal significance of those facts. Petitioner claims that, under 21 U.S.C. 6335, those facts invalidate respondent's deed, while respondent disputes that claim. That dispute about the effect of Section 6335 raises a substantial federal question and is sufficient to confer federal question jurisdiction.

The Court's decision in *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986), does not detract from the conclusion that petitioner's action arises under federal law. In that case, the Court held that because Congress had failed to create a private cause of action to enforce federal misbranding requirements, a state negligence action incorporating a federal misbranding standard as evidence of negligence did not arise under federal law. Congress's failure to create a federal quiet title action for resolution of private disputes over the validity of federal tax deeds, however, does not carry the same implication, for two reasons.

First, *Merrell Dow* did not purport to disturb the *Hopkins* line of decisions. Under those decisions, petitioner's action arises under federal law.

Second, the failure to create a private cause of action had special significance in *Merrell Dow* because Congress did not require the federal misbranding requirement to be an ingredient of any cause of action, state or federal. Rather, the State voluntarily decided to incorporate the federal misbranding standard as evidence of negligence under state law. That voluntary absorption of a federal standard did not fundamentally change the state law character of the plaintiff's tort action, and there was therefore not a sufficiently substantial federal interest in the resolution of the plaintiff's negligence claim to confer federal court jurisdiction.

In contrast, in resolving a state quiet title action challenging a federal tax deed, a state court is required by the Supremacy Clause to apply federal standards in deciding whether title is validly transferred. Thus, a State does not have the same interest in having its courts resolve a dispute that depends on the meaning or effect of those federal requirements, and the federal interest in the resolution of such a dispute is substantial. The federal interest is particularly weighty when, as here, the plaintiff's right to relief necessarily depends on an allegation that federal officials have violated federal law. Such a suit arises under federal law, and nothing in *Merrell Dow* suggests otherwise.

ARGUMENT

PETITIONER'S ACTION ARISES UNDER FEDERAL LAW AND IS THEREFORE REMOVABLE BECAUSE PETITIONER'S RIGHT TO RELIEF DEPENDS ON ITS CLAIM THAT RESPONDENT'S DEED IS INVALID UNDER FEDERAL TAX LAW

A suit filed in state court may be removed to federal court when it falls within the original jurisdiction of the federal courts. 28 U.S.C. 1441(a). A suit falls within the original jurisdiction of the federal courts when it "arises under" federal law. 28 U.S.C. 1331. Petitioner's suit arises under federal law and was therefore removable to federal court because petitioner's right to relief depends on its claim that respondent's deed is invalid under federal tax law.

A. A Suit Arises Under Federal Law When A Plaintiff's Right To Relief Depends On The Resolution Of A Substantial Federal Question

1. The vast majority of cases that arise under federal law are ones in which federal law supplies the cause of action. *Merrell Dow Pharms. Inc.* v. *Thompson*, 478 U.S. 804, 808 (1986). A case can also arise under federal law, however, when a plaintiff's right to relief under a state law cause of action depends on the resolution of a question of federal law. *Id.* at 808-809 & n.5.

In *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), the Court squarely held that a federal cause of action is not required for an action to arise under federal law. Relying on numerous prior decisions, the Court explained that "[t]he general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United

States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction." *Id.* at 199. Applying that standard, the Court held that a state law shareholder suit to prevent a corporation from investing in federal bonds arose under federal law, because the plaintiff's right to relief depended on its claim that the bonds were issued under an unconstitutional federal statute. *Id.* at 201-202.

In *City of Chicago* v. *International College of Surgeons*, 522 U.S. 156 (1997), the Court reaffirmed that a suit can arise under federal law even when the cause of action is supplied by state law. The Court stated that "[e]ven though state law creates [a party's] causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that its right to relief under state law requires resolution of a substantial question of federal law." *Id.* at 164 (brackets in original) (citation omitted). Applying that standard, the Court held that the plaintiff's federal constitutional challenges to a city's landmark ordinance arose under federal law and the case was therefore removable even though the plaintiff's cause of action was supplied exclusively by the State's administrative review law. The Court rejected the plaintiff's reliance on the principle that, as a master of its complaint, a plaintiff can choose to have its suit heard in state court. *Ibid.* The Court explained that "[b]y raising several claims that arise under federal law, [the plaintiff] subjected itself to the possibility that the [defendant] would remove the case to the federal courts." *Ibid.*

As the decisions in *Smith* and *International College of Surgeons* reflect, the Court has not adopted as the exclusive test of federal court jurisdiction the statement in *American Well Works Co.* v. *Layne & Bowler*

Co., 241 U.S. 257, 260 (1916), that a "suit arises under the law that creates the cause of action." Instead, as this Court has explained, it is "well settled" that the *American Well Works* formulation "is more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction." *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 9 (1983); accord *Merrell Dow*, 478 U.S. at 809 n.5.

2. While an action can arise under federal law even when the cause of action is supplied by state law, the "well-pleaded complaint" rule "severely limits" the number of such cases. *Franchise Tax Bd.*, 463 U.S. at 9-10. Under the well-pleaded complaint rule, a court must determine whether a complaint arises under federal law based solely on "what necessarily appears in the plaintiff's statement of his own claim." *Taylor* v. *Anderson*, 234 U.S. 74, 75 (1914). Allegations that are made to refute an anticipated federal defense are disregarded. *Id.* at 75-76. Federal law must supply "an element, and an essential one, of the plaintiff's cause of action." *Franchise Tax Bd.*, 463 U.S. at 11 (quoting *Gully* v. *First Nat'l Bank*, 299 U.S. 109, 112 (1936)).

B. Petitioner's Claim Arises Under Federal Law Because Its Right To Relief Necessarily Depends On Federal Tax Law

Applying those principles, petitioner's claim arises under federal law. While petitioner's claim is founded on a state law cause of action, petitioner's right to relief necessarily depends on a disputed question of federal law.

1. Petitioner's complaint does not identify the cause of action on which it relies. But the language of

petitioner's complaint suggests, and petitioner has confirmed, Pet. Br. 17, that petitioner is relying on Mich. Comp. Laws. Ann. § 600.2932 (West 2000) for its cause of action. That state statute authorizes any person who claims title to property to bring a quiet title action against any person who claims any inconsistent interest in the property. *Id.* § 600.2932(1). If the plaintiff establishes title to the land, the defendant is ordered to release to the plaintiff all claims to that land. *Id.* § 600.2932(3).

2. While petitioner's cause of action is supplied by state law, its claim nonetheless arises under federal law because petitioner's right to relief under state law necessarily depends on federal tax law. That conclusion follows from "what necessarily appears in the plaintiff's statement of [its] own claim." *Taylor*, 234 U.S. at 75-76.

Petitioner alleged in its complaint that respondent had obtained a deed to the property in question in a federal tax sale, but that the deed "is invalid" because it "was given with improper notice pursuant to 26 U.S.C. 6331, et seq." Br. in Opp. App. 2, at 4A. Petitioner specifically relied in its complaint on 26 U.S.C. 6335, which generally requires notice of a seizure of property to be given or left at the usual place of abode or business by the IRS. Petitioner claimed that "since the tax deed was given pursuant to improper notice as required by 26 USC 6335(a), said transfer and claim through the tax deed is null and void and void ab initio." Br. in Opp. App. 2, at 4A. Petitioner's complaint thus makes clear that petitioner seeks relief based on its assertion that, as a matter of federal law, the IRS's failure to give notice in accordance with 26 U.S.C. 6335 invalidated respondent's deed.

Furthermore, petitioner's allegation that respondent's deed is invalid under federal law is an "element,

and an essential one, of the [petitioner's] cause of action" under Michigan Comp. Laws Ann. § 600.2932 (West 2000). *Gully*, 299 U.S. at 112. Michigan law expressly requires a plaintiff in an action under Michigan Comp. Laws Ann. § 600.2932 (West 2000) to allege "the facts establishing the superiority of the plaintiff's claim." Mich. R. Civ. P. 3.411. Petitioner fulfilled that pleading requirement by alleging that respondent's deed is invalid under 26 U.S.C. 6335. Without that allegation, petitioner would not have stated a claim for relief under Michigan law, as petitioner concedes. Pet. Br. 18 ("federal law" was a "required element"). Accordingly, the complaint's reliance on federal tax laws was not the mere refutation of an anticipated affirmative defense, but rather an essential element of petitioner's cause of action. Under the well-pleaded complaint rule, therefore, petitioner's action arises under federal law.

C. This Court's Decisions Establish That A Suit Arises Under Federal Law When The Plaintiff Seeks To Establish A Superior Interest In Property, And The Resolution Of That Claim Depends On Federal Law

1. This is not the first time the Court has been called upon to decide whether an action arises under federal law when the plaintiff seeks to establish a superior claim to land, and the resolution of that claim depends on federal law. The Court confronted that very question in *Hopkins* v. *Walker*, 244 U.S. 486 (1917). There, the holders of a United States patent for a mining claim filed suit to remove a cloud on title caused by the defendants' claims to title based on certificates of location. Plaintiffs alleged that, by virtue of the federal mining laws, their claim was valid and the defendants' claims were invalid. The defendants argued that there was no

federal court jurisdiction because the allegations concerning the invalidity of the defendants' claims under the federal mining laws were not a necessary element of the plaintiffs' cause of action and therefore had to be disregarded. *Id.* at 490. The Court rejected that argument, reasoning that "[i]n both form and substance the bill is one to remove a particular cloud from the plaintiffs' title, as much so as if the purpose were to have a tax deed, a lease or a mortgage adjudged invalid and cancelled." *Ibid.* Therefore, the Court explained, "[i]t hardly requires statement that in such cases the facts showing the plaintiffs' title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff's cause of action." *Ibid.* The Court therefore held that the plaintiffs' claim arose under the federal mining laws, giving the federal district court jurisdiction over the claim. *Id.* at 491.

This case parallels *Hopkins* in every relevant respect. Here, as in *Hopkins*, the action is one to remove a cloud on the plaintiff's title. Br. in Opp. App. 2, at 3A-4A; Pet. Br. 8. Here, as in *Hopkins*, establishing the invalidity of the defendant's title is an essential element of the plaintiff's cause of action. And here, as in *Hopkins*, the plaintiff seeks to establish the invalidity of the defendant's title on the basis of federal law. Thus, here, as in *Hopkins*, petitioner's action arises under federal law.

2. In addition to *Hopkins*, four other cases have applied the rule that a suit arises under federal law when the plaintiff seeks to establish a superior interest in property, and the plaintiff's right to relief depends on federal law. Those cases confirm that petitioner's claim arises under federal law.

Northern Pacific Railway v. *Soderberg*, 188 U.S. 526 (1903), is the earliest decision. In that case, a railroad claiming title to land under a federal grant that excluded "mineral lands" sued to enjoin the defendant from taking granite from the land. The railroad's right to relief depended on the question whether the land was mineral or non-mineral under federal law. Because the railroad's right to relief depended on a resolution of that federal law issue, the Court held that the suit arose under the laws of the United States. *Id.* at 528.

In *Wilson Cypress Co.* v. *Del Pozo y Marcos*, 236 U.S. 635 (1915), the plaintiffs filed suit to quiet title to property that was claimed by the defendant on the basis of tax sales. Plaintiff relied on federal laws and a federal treaty with Spain to defeat the defendant's claim to title under the tax sales. *Id.* at 643-644. Because there was "scarcely a contention of [the plaintiff's] which [did] not primarily or ultimately depend upon the laws of the United States," the Court held that the case arose under federal law. *Id.* at 644.

In *Lancaster* v. *Kathleen Oil Co.*, 241 U.S. 551 (1916), the plaintiff and the defendant had conflicting mining leases from the same owner, and the plaintiff sought to enjoin the defendant from asserting any rights under its lease. Because the plaintiff's right to relief depended on construction of a federal law relating to allotted Indian lands and on the effect of the Secretary of the Interior's approval of the defendant's lease, the Court held that the suit was one arising under federal law. *Id.* at 552-556.

Finally, in *Smith* v. *McCullough*, 270 U.S. 456 (1926), the plaintiffs and the defendant had conflicting mining leases from the same owner, and the resolution of their competing claims depended on a construction of the federal laws relating to the right of Quapaw Indians to

alienate and lease their lands. Even though plaintiff's complaint did not make clear that there was a genuine dispute about the meaning and effect of those federal laws, the Court allowed an amendment to the complaint to show that there was such a dispute, and held that the complaint, as so amended, arose under federal law. *Id.* at 459-460.

3. In contrast to the *Hopkins* line of cases, the Court held in *Taylor* v. *Anderson*, *supra*, that an action seeking common law ejectment does not arise under federal law even when the validity of the defendant's claim of ownership depends on federal law. 234 U.S. at 74-76. The Court explained that, in order to plead a claim for common law ejectment, the plaintiff need only allege that he has title and that the defendant is wrongfully in possession. *Id.* at 74. The plaintiff need not set forth facts establishing why his title is superior to that of the defendant. *Id.* at 75. The defendant may ultimately assert superior title based on federal law as a defense, and the resolution of the dispute between the parties may ultimately turn on the validity of that defense. But under the well-pleaded complaint rule, that possibility is not sufficient to establish that the plaintiff's claim arises under federal law. *Id.* at 75-76.

The policies underlying the well-pleaded complaint rule justify the distinction between actions to remove a cloud on title, as in *Hopkins* and this case, and common law ejectment actions, as in *Taylor*. The well-pleaded complaint rule serves as a "quick rule of thumb" for determining when there is a sufficient federal interest in a case to warrant federal court jurisdiction. *Franchise Tax Bd.*, 463 U.S. at 11. A federal issue that can arise only when it is raised as an affirmative defense may never require decision; the defendant may not assert the defense, and even if he does, the plaintiff may

fail to establish the elements of his claim, obviating the need for a resolution of the federal issue. See *Gully*, 299 U.S. at 117. In such cases, "[t]he most one can say is that a question of federal law is lurking in the background," *ibid.*, not that (as here) the federal question is "an element, and an essential one, of the plaintiff's cause of action," *id.* at 112.

In addition to serving as a proxy for the existence of a sufficient federal interest to warrant federal court jurisdiction, application of the well-pleaded complaint rule also protects the States' legitimate interest in having their courts resolve controversies that are likely to depend on state law issues. *Franchise Tax Bd.*, 463 U.S. at 9-10; *Holmes Group, Inc.* v. *Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 832 (2002). The well-pleaded complaint rule may produce "awkward results" when it turns out that the only matter in dispute between the parties is the validity of a federal defense. *Franchise Tax Bd.*, 463 U.S. at 12. But there is a value in clarity and ease of administration in applying jurisdictional rules, and efforts to create exceptions to the well-pleaded complaint rule would threaten to undermine that interest. *Holmes Group*, 535 U.S. at 832. The Court has therefore applied the well-pleaded complaint rule even in cases in which it has become clear that the validity of a federal defense is the only matter genuinely in dispute. *Franchise Tax Bd.*, 463 U.S. at 12.

Thus, in deciding whether an allegation that the defendant's title is invalid under federal law is sufficient to show that the plaintiff's claim arises under federal law, the Court's cases have drawn a distinction between actions to remove a cloud on title and common law actions for ejectment. In the former, that allegation is necessary to state a claim and therefore creates

arising-under jurisdiction. In the latter, the allegation merely lurks as an affirmative defense and therefore does not create arising-under jurisdiction. Because this case involves an action to remove a cloud on title based on the alleged invalidity of the defendant's title under federal law, it arises under federal law.

D. Petitioner's Complaint Shows That There Is A Real Dispute Respecting The Construction Or Effect Of Federal Tax Law

In arguing that its claim does not arise under federal law, petitioner relies on the principle that "[a] suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws," but instead so arises only when "it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." *Shulthis* v. *McDougal*, 225 U.S. 561, 569 (1912). Under that principle, a plaintiff's reliance on a federal land grant as the origin of its title does not in itself show that a quiet title action arises under federal law, because the validity, construction, and effect of the land grant itself is unlikely to be contested, and the real dispute is likely to center on state law issues. Moreover, if reliance on a federal land grant as the origin for title were sufficient to show that a claim arises under federal law, "every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws." *Id.* at 569-570.

In this case, however, jurisdiction is not founded on an uncontested allegation that petitioner can trace its title back to a federal land grant. Rather, jurisdiction is founded on petitioner's contested allegation that

respondent's recently acquired federal tax deed is invalid because IRS officials failed to satisfy the requirements of federal law regarding notice of the seizure of property. That allegation is sufficient to show that petitioner's claim "really and substantially involves a dispute or controversy respecting the * * * construction or effect of [federal] law, upon the determination of which the result depends." *Shulthis*, 225 U.S. at 569.

Petitioner contends (Pet. 14) that there is no such dispute because the parties agree that, as a factual matter, IRS officials did not give personal notice of the seizure or leave the notice at petitioner's place of business as required by Section 6335. But while the parties do not dispute those underlying facts, they do dispute the legal significance of those facts. Petitioner argues that, under Section 6335, those facts invalidate respondent's deed, while respondent disagrees with petitioner's legal position.

According to petitioner (Br. 14), the dispute over the construction or effect of Section 6335 materialized only when respondent interjected the argument that under Section 6339(b)(2), substantial compliance with Section 6335's notice requirements was sufficient to transfer petitioner's title to respondent. But petitioner alleged in its own complaint both that respondent's deed was invalid by virtue of the failure to give the notice required by Section 6335 and that respondent nonetheless asserted title to the land in question under a federal tax sale. Br. in Opp. App. 2, at 4A. Thus, based on petitioner's complaint alone, and before there was any express mention of Section 6339, it was apparent that this case "involve[d] a dispute or controversy respecting the * * * construction or effect of" Section 6335. *Shulthis*, 225 U.S. at 569. Respondent's express

interjection of Section 6339 merely clarified the nature and scope of the disagreement about the effect of Section 6335, a disagreement that was already evident on the face of the complaint and that constitutes the controlling issue in the case.

E. Neither *Merrell Dow* Nor *Beneficial National Bank* Detracts From The Conclusion That Petitioner's Claim Arises Under Federal Law

1. In arguing that its claim does not arise under federal law, petitioner relies primarily on *Merrell Dow*. Petitioner's reliance on that case is misplaced.

In *Merrell Dow*, the Court held that a state law negligence action that relied on a violation of a federal misbranding requirement as prima facie evidence of negligence did not arise under federal law. The Court concluded that Congress had decided not to create a private right of action to enforce the federal misbranding requirement and that it would "undermine" congressional intent to permit a federal court to "exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a 'rebuttable presumption' or a 'proximate cause' under state law, rather than a federal action under federal law." 478 U.S. at 812. The Court further concluded that "the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal-question jurisdiction." *Id.* at 814.

Petitioner argues that, under *Merrell Dow*, Congress's decision not to provide a cause of action to

enforce a federal statutory provision necessarily means that a claim that relies on that federal statutory provision cannot arise under federal law. Pet. Br. 26-30. Because federal law does not give a federal taxpayer a cause of action to challenge the validity of a deed obtained in a tax sale, petitioner contends, petitioner's claim cannot arise under federal law. *Ibid.* Petitioner's contention is incorrect, for two reasons.

First, if *Merrell Dow* were read in the manner suggested by petitioner, it would have overruled the *Hopkins* line of cases as well as the Court's decision in *Smith*. The *Merrell Dow* Court, however, did not purport to disturb those decisions. To the contrary, the Court expressly indicated that its decision was consistent with *Smith*. *Id.* at 814 n.12. Because petitioner's claim arises under federal law under the *Hopkins* line of decisions, it is unaffected by *Merrell Dow*.[2]

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[2] Some appellate court decisions have nonetheless read *Merrell Dow* to hold that a federal cause of action is an indispensable requirement of arising-under jurisdiction. See Pet. Br. 25-30 & n.2. Other post *Merrell Dow* decisions, sometimes from the same circuit, have correctly recognized that a case can arise under federal law if the plaintiff's right to relief under a state law cause of action depends on federal law. *Almond* v. *Capital Props., Inc.*, 212 F.3d 20, 23-24 & n.3 (1st Cir. 2000); *D'Alessio* v. *NYSE*, 258 F.3d 93, 99-104 (2d Cir.), cert. denied, 534 U.S. 1066 (2001); *West 14th St. Commercial Corp.* v. *5 West 14th Owners Corp.*, 815 F.2d 188, 193-196 (2d Cir.), cert. denied, 484 U.S. 850 and 871 (1987); *U.S. Express Lines Ltd.* v. *Higgins*, 281 F.3d 383, 389-391 (3d Cir. 2002); *Verizon Md., Inc.* v. *Global Naps, Inc.*, 377 F.3d 355, 366 (4th Cir. 2004); *Battle* v. *Seibels Bruce Ins. Co.*, 288 F.3d 596, 606-608 (4th Cir. 2002); *Ormet Corp.* v. *Ohio Power Co.*, 98 F.3d 799, 807 (4th Cir. 1996); *40235 Washington St. Corp.* v. *Lusardi*, 329 F.3d 1076, 1079-1080 (9th Cir. 2003); *King County* v. *Rasmussen*, 299 F.3d 1077, 1081-1082 (9th Cir. 2002), cert. denied, 538 U.S. 1057 (2003); *BellSouth Telecomm., Inc.* v. *MCImetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278-1279 (11th Cir. 2003); *Floyd* v. *District of Columbia*, 129 F.3d 152, 155 (D.C. Cir. 1997). Three of those decisions involved actions to determine interests in land based on federal law. *West 14th St. Commercial Corp., supra*; *40235 Washington St. Corp., supra*; *King County, supra.*

Second, as the Court indicated in *Merrell Dow*, that decision is reconcilable with prior decisions upholding federal jurisdiction based on "the *nature* of the federal interest at stake." 478 U.S. at 814 n.12. The nature of the federal interest in this case is identical to that in the *Hopkins* line of cases and differs markedly from that in *Merrell Dow*, making the latter decision inapposite here.

In *Merrell Dow*, the State voluntarily incorporated federal law into its state law negligence standard. Nothing in federal law required that approach; the State could have decided that a violation of the federal misbranding provision would not constitute negligence under state law. Under the Court's analysis, the State also could have decided to incorporate the federal misbranding standard in several different ways. It could have treated a violation of the federal standard as negligence per se, presumptive negligence, or merely as some evidence of negligence. As the Court explained in *Merrell Dow*, in those circumstances, the State's voluntary absorption of the federal standard does not "fundamentally change the state tort nature of the action," 478 U.S. at 815 n.12; the ultimate source of the legal obligation is the State's sovereign authority to prescribe its own tort law standards, not any preemptive enactment by Congress. Because the action still involves a State's choice about when a plaintiff should receive compensation from a defendant, and because the federal law issue may be inextricably intertwined

with important state law issues on the extent to which the federal standard has been incorporated into state law, a State retains a substantial interest in having its own courts resolve the federal issue, and the federal interest in the resolution of that issue is not sufficiently substantial to confer federal court jurisdiction.

Recognition of federal jurisdiction to resolve the claim at issue in *Merrell Dow* also would have created the possibility of federal court jurisdiction over any tort action in which a State treated any of the numerous federal health and safety standards as evidence of negligence. The potential for original federal court jurisdiction, moreover, would have existed in every case in which a federal law negligence theory was only one of several theories of recovery, as it was in *Merrell Dow*. See 478 U.S. at 817 n.15. Thus, had the Court accepted the invitation to hold that the negligence claim at issue in *Merrell Dow* arose under federal law, it would have effectively transformed federal courts into the primary administrators of large areas of state tort law, a consequence that Congress could not possibly have intended.

The situation here is very different. Congress has established by statute the procedures to be followed in federal tax sales, 26 U.S.C. 6331 *et seq.*, and it has enacted a uniform substantial compliance standard for deciding the extent to which those requirements must be followed in order for title to be transferred. 26 U.S.C. 6339. In resolving a quiet title action involving the validity of a federal tax deed, therefore, a state court does not have the option to forego reliance on the federal procedural requirements or the federal substantial compliance standard, nor could it adopt them only as rebuttable evidence of satisfaction of a state law standard. Under the Supremacy Clause, the

requirements and the standard adopted by Congress bind "the Judges in every State * * *, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, Cl. 2. Because federal law applies by operation of the Supremacy Clause, rather than through the State's voluntary choice, a State does not have the same interest in having its courts resolve the issue, and the federal interest in the issue is substantial.

This case involves a particularly important area for the exercise of federal court jurisdiction. The government has a strong interest in the "prompt and certain collection of delinquent taxes." *United States* v. *Rodgers*, 461 U.S. 677, 709 (1983). That interest is advanced through the development of a uniform body of law specifying the actions that the IRS must take to transfer title validly in a federal tax sale. While allowing such disputes to be resolved in federal courts cannot guarantee perfect uniformity, it does promote the development of a uniform body of law in a way that is not possible when decisions are left to state court systems, subject only to review by this Court. The United States' interest in the development of a uniform body of federal law is heightened in this context, because it is potentially subject to a quiet title action under 28 U.S.C. 2410, a contract action under 28 U.S.C. 1346, or a damages action under 26 U.S.C. 7433, if IRS officials fail to comply with the requirements of federal law that relate to the seizure and sale of property to satisfy delinquent federal tax liabilities.

This case illustrates the significance of the federal interest at stake. Petitioner has alleged that a federal tax sale conducted by the IRS in order to collect federal taxes should be invalidated because federal officials violated federal tax law. The federal interest in the

resolution of that question could not be clearer. When a plaintiff's suit depends on an allegation that federal tax officials have violated federal tax law, that suit necessarily arises under federal law.

The fundamental difference between the nature of the federal interest in *Merrell Dow*, and the nature of the federal interest here also explains why Congress's failure to create a cause of action was significant in *Merrell Dow*, but is not significant here. Congress's failure to create a cause of action in *Merrell Dow* reflected Congress's intent not to require federal misbranding laws to be an ingredient in any private cause of action, state or federal, and state suits incorporating federal misbranding standards therefore did not implicate a substantial federal interest. In contrast, because Congress has required federal tax sale requirements to be applied in state law quiet title actions, see 26 U.S.C. 6339(b)(2), Congress's failure to create a federal cause of action to enforce the federal requirements is not evidence of the absence of a substantial federal interest in how those requirements are applied. To the contrary, the very fact that Congress has mandated the application of federal requirements in state quiet title actions establishes a substantial federal interest in actions that depend on the meaning or effect of those requirements. The federal interest is particularly strong when the dispositive question is whether federal officials have transferred title to land in accordance with federal law. Accordingly, the federal interest in the resolution of petitioner's claim is sufficiently substantial to confer federal court jurisdiction, and nothing in *Merrell Dow* suggests otherwise.

2. Finally, petitioner errs in relying on *Beneficial National Bank* v. *Anderson*, 539 U.S. 1, 8 (2003). Pet. Br. 32-33. In that case, the Court held that, notwithstanding the plaintiff's failure to allege a federal claim in his complaint, a case may be removed to federal court when federal law necessarily supplies the exclusive cause of action, such that there is, in reality, no state-law cause of action to allege. That "complete preemption" holding has no bearing on the distinct question presented here—whether a case may be removed to federal court when the plaintiff's cause of action is concededly derived from state law, but the plaintiff expressly and necessarily relies on federal law to establish its right to relief.

Petitioner relies on the Court's statement in *Beneficial National Bank* that, "[a]s a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim." 539 U.S. at 6. Petitioner's complaint, however, does "affirmatively allege[] a federal claim"—that respondent's deed is invalid under federal law. In any event, the Court's statement, like the statement in *American Well Works*, see pp. 11-12, *supra*, purports only to describe what is true "as a general rule." The Court presumably was not attempting to set forth a definitive description of the scope of federal court arising-under jurisdiction, and the case presented no occasion to address the question at issue here. Regardless of its precise meaning, the statement cited by petitioner could not have been intended to overrule the Court's holdings in the *Hopkins* line of cases to the effect that a suit arises under federal law when, as here, the plaintiff's right to a determination that it has a superior interest in land necessarily depends on a disputed issue of federal law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

EILEEN J. O'CONNOR
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

GILBERT S. ROTHENBERG
TERESA E. MCLAUGHLIN
Attorneys

MARCH 2005

APPENDIX

1. Title 26 of the United States Code provides in pertinent part:

§ 6321. Lien for taxes

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

* * * * *

§ 6331. Levy and distraint

(a) Authority of Secretary

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. * * *

(b) Seizure and sale of property

The term "levy" as used in this title includes the power of distraint and seizure by any means. Except as otherwise provided in subsection (e), a levy shall extend only to property possessed and obligations existing at the time thereof. In any case in which the Secretary may levy upon property or rights to property, he may

seize and sell such property or rights to property (whether real or personal, tangible or intangible).

* * * * *

§ 6335. Sale of seized property

(a) Notice of seizure

As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property (or, in the case of personal property, the possessor thereof), or shall be left at his usual place of abode or business if he has such within the internal revenue district where the seizure is made. If the owner cannot be readily located, or has no dwelling or place of business within such district, the notice may be mailed to his last known address. Such notice shall specify the sum demanded and shall contain, in the case of personal property, an account of the property seized and, in the case of real property, a description with reasonable certainty of the property seized.

(b) Notice of sale

The Secretary shall as soon as practicable after the seizure of the property give notice to the owner, in the manner prescribed in subsection (a), and shall cause a notification to be published in some newspaper published or generally circulated within the county wherein such seizure is made, or if there be no newspaper published or generally circulated in such county, shall post such notice at the post office nearest the place where the seizure is made, and in not less than two other public places. Such notice shall specify the property to be sold, and the time, place, manner, and conditions of the sale thereof. * * *

* * * * *

§ 6337. Redemption of property

* * * * *

(b) Redemption of real estate after sale

(1) Period

The owners of any real property sold as provided in section 6335, their heirs, executors, or administrators, or any person having any interest therein, or a lien thereon, or any person in their behalf, shall be permitted to redeem the property sold, or any particular tract of such property, at any time within 180 days after the sale thereof.

(2) Price

Such property or tract of property shall be permitted to be redeemed upon payment to the purchaser, or in case he cannot be found in the county in which the property to be redeemed is situated, then to the Secretary, for the use of the purchaser, his heirs, or assigns, the amount paid by such purchaser and interest thereon at the rate of 20 percent per annum.

* * * * *

§ 6338. Certificate of sale; deed of real property

(a) Certificate of sale

In the case of property sold as provided in section 6335, the Secretary shall give to the purchaser a certificate of sale upon payment in full of the purchase price. In the case of real property, such certificate shall set forth the real property purchased, for whose taxes

the same was sold, the name of the purchaser, and the price paid therefor.

(b) Deed to real property

In the case of any real property sold as provided in section 6335 and not redeemed in the manner and within the time provided in section 6337, the Secretary shall execute (in accordance with the laws of the State in which such real property is situated pertaining to sales of real property under execution) to the purchaser of such real property at such sale, upon his surrender of the certificate of sale, a deed of the real property so purchased by him, reciting the facts set forth in the certificate.

* * * * *

§ 6339. Legal effect of certificate of sale of personal property and deed of real property

* * * * *

(b) Deed of real property

In the case of the sale of real property pursuant to section 6335—

(1) Deed as evidence

The deed of sale given pursuant to section 6338 shall be prima facie evidence of the facts therein stated; and

(2) Deed as conveyance of title

If the proceedings of the Secretary as set forth have been substantially in accordance with the provisions of law, such deed shall be considered and operate as a conveyance of all the right, title, and interest the party delinquent had in and to the real property thus sold at the time the lien of the United States attached thereto.

* * * * *

2. Title 28 of the United States Code provides in pertinent part:

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

3. Section 600.2932 of the Michigan Complied Laws Annotated provides in pertinent part:

§ 600.2932 Action to determine interests in land

Sec. 2932. (1) **Interest of plaintiff.** Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an

action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.

* * * * *

(3) **Establishment of title, relief afforded.** If the plaintiff established his title to the lands, the defendant shall be ordered to release to the plaintiff all claims thereto. In an appropriate case the court may issue a writ of possession or restitution to the sheriff or other proper officer of any county in this state in which the premises recovered are situated.

* * * * *

(5) **Actions equitable in nature.** Actions under this section are equitable in nature.

4. Rule 3.411 of the Michigan Rules of Civil Procedure provides in pertinent part:

RULE 3.411 CIVIL ACTION TO DETERMINE INTERESTS IN LAND

(A) This rule applies to actions to determine interests in land under MCL 600.2932; MSA 27A.2932. It does not apply to summary proceedings to recover possession of premises under MCL 600.5701-600.5759; MSA 27A.5701-27A.5759.

(B) Complaint.

(1) The complaint must describe the land in question with reasonable certainty by stating

(a) the section, township, and range of the premises;

(b) the number of the block and lot of the premises; or

(c) another description of the premises sufficiently clear so that the premises may be identified.

(2) The complaint must allege

(a) the interest the plaintiff claims in the premises;

(b) the interest the defendant claims in the premises; and

(c) the facts establishing the superiority of the plaintiff's claim.

* * * * *

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No. 04-603

IN THE

Supreme Court of the United States

GRABLE & SONS METAL PRODUCTS, INC.,
Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* JEROME R. MIKULSKI *ET UX*. IN SUPPORT OF PETITIONER

ERIC H. ZAGRANS *
WOMBLE CARLYLE SANDRIDGE & RICE PLLC
1401 Eye Street, N.W., 7th Floor
Washington, D.C. 20005-2225
(202) 857-4516

* Counsel of Record

Counsel for Amici Curiae

Additional counsel listed on inside cover

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

THOMAS R. THEADO
GARY, NAEGELE & THEADO
446 Broadway
Lorain, Ohio 44052-1797
(440) 244-4809

DENNIS P. BARRON
P.O. Box 8190
Cincinnati, Ohio 45208
(513) 871-2369

EBEN O. MCNAIR IV
DANIEL S. WHITE
SCHWARZWALD & MCNAIR
616 Penton Media Building
1300 East Ninth Street
Cleveland, Ohio 44114-1503
(216) 566-1600

Counsel for Amici Curiae

MOTION OF JEROME R. MILUSKI *ET UX.* FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Jerome R. Mikulski and Elzetta C. Mikulski hereby move the Court, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amici curiae* in support of Petitioner. Petitioner has consented to the filing of this brief; a copy of the written consent of its counsel has been lodged with the Clerk of the Court. Respondent has failed to grant consent, thereby necessitating this motion.

The resolution of this case is of great importance to the Mikulskis who (as is more fully set forth in the section of the proposed *amici* brief headed "Interest of *Amici Curiae*") are the named plaintiffs and class representatives in four consolidated shareholder class action suits in which the proper scope of the removal jurisdiction of the federal courts with respect to claims seeking relief exclusively under state law, but for which the violation of a federal statute is an important factual element, has been placed squarely at issue. In their cases, as in this case, Congress did not establish a federal cause of action for violations of the relevant provision of the Internal Revenue Code, nor does the federal statute itself create any rights that corporations or corporate shareholders can enforce. The lower courts' refusals to remand in this case and in the Mikulskis' cases (which are now pending on consolidated appeal before the Sixth Circuit, Case No. 03-4486, and on petition for writ of certiorari before judgment in this Court, Case No. 04-1058) operate to expand significantly the limited removal jurisdiction of the federal district courts in the absence of diversity in ways contrary to the decisions of this Court and the overwhelming majority of the Circuits, and that usurp the authority of Congress to decide the contours of federal question jurisdiction within constitutional limits.

Specifically, Mr. and Mrs. Mikulski believe that their brief as *amici curiae* will aid the Court by (i) illustrating the struc-

tural and conceptual framework and import of the last twenty years of this Court's federal question and removal jurisprudence from *Merrell Dow Pharmaceuticals, Inc. v. Thompson* to *Beneficial National Bank v. Anderson*, establishing the proposition that the presence of even a "substantial" federal question in a state law cause of action is not a sufficient basis for federal removal jurisdiction absent a federal private right of action, (ii) explaining why the decision below cannot be reconciled with this Court's "substantial federal question" jurisprudence, and (iii) describing the errors committed by the court below in misunderstanding the import and near unanimity of the decisions in the other Circuits on this issue.

In order to provide the Court with such relevant information not already brought to the Court's attention by the parties, movants respectfully request the Court to grant them leave to file their *amici curiae* brief submitted herewith.

Respectfully submitted,

ERIC H. ZAGRANS *
WOMBLE CARLYLE SANDRIDGE
& RICE PLLC
1401 Eye Street, N.W., 7th Floor
Washington, D.C. 20005-2225
(202) 857-4516

* Counsel of Record

Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

No. 04-603

GRABLE & SONS METAL PRODUCTS, INC.,
Petitioner,

v.

DARUE ENGINEERING & MANUFACTURING, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* JEROME R. MIKULSKI *ET UX.* IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Jerome R. Mikulski and Elzetta C. Mikulski are California taxpayers who have been shareholders of Centerior Energy Corp. and its successor, FirstEnergy Corporation (collectively "Centerior"), continuously since 1985. They are plaintiffs and named class representatives in four consolidated shareholder class action suits against Centerior arising from its fraudulent accounting practices which misinformed shareholders over the course of many years that they had received taxable dividends instead of tax-free returns of capital and

[1] Pursuant to Rule 37.6, no counsel for either party authored this brief in whole or in part, nor did any party make a monetary contribution to the preparation or submission of this brief.

improperly instructed them to overpay their respective federal and state income taxes, thereby passing off approximately $500 million of Centerior's own tax liability onto its shareholders. The Mikulskis' state law claims for fraud and breach of contract on behalf of the shareholder class allege that this fraud had its origins in Centerior's violation of the effective date provisions of Section 312(n)(1) of the Internal Revenue Code, 26 U.S.C. § 312(n)(1). However, Congress did not provide a federal cause of action for violations of Section 312(n)(1), nor does the federal statute itself create any rights that corporate shareholders can enforce. Centerior removed the cases to federal district court which ruled that it had valid removal jurisdiction due to the presence of a substantial federal question based on the federal tax laws. The Mikulskis' appeal is pending before the Sixth Circuit, Case No. 03-4486, and their petition for writ of certiorari before judgment is pending before this Court, Case No. 04-1058.

Similarly, in this case, the Sixth Circuit held that Grable's state law claim to quiet title was deemed to be a federal question because it required the interpretation of a provision of the Internal Revenue Code. These refusals to remand in Grable and Mikulski significantly expand the limited jurisdiction of the federal district courts in removal situations and transform a simple violation of federal law as an element of a state law cause of action into a substantial federal question, contrary to the holdings of this Court and in conflict with the decisions of several other Circuits. Allowing these decisions to stand constitutes an open invitation for all litigants to remove a state law claim that includes a federal question, or merely alleges a violation of federal law, without having to show original jurisdiction in the district court. Such an open invitation will clog an already overburdened federal judicial system and is contrary to the guidance given by this Court's earlier decisions.

Mr. and Mrs. Mikulski have a strong interest in seeking reversal of the erroneous decision of the Court of Appeals for the Sixth Circuit in this case and asking the Court to announce explicitly that the conceptual framework and import of its prior holdings in *Merrell Dow Pharmaceuticals, Inc. v. Thompson* and *Beneficial National Bank v. Anderson* mean that the presence of a substantial federal question in a state law cause of action is not a sufficient basis for federal removal jurisdiction absent a federal private right of action. Their *amici* brief is submitted in the hope that it will be of assistance to the Court in analyzing the issues presented.

SUMMARY OF THE ARGUMENT

In *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), this Court reaffirmed the principle that the mere presence of a federal statute in an action that seeks relief solely under state law (*i.e.*, where a violation or interpretation of federal law is asserted as a factual or legal element of a state claim), even one that "preempts" state law, will not automatically provide a basis for removal jurisdiction, thus completing the structural framework for federal question jurisdiction that it began in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). The Court eliminated the "substantial federal question" doctrine as a sufficient basis for removal jurisdiction in *Beneficial National Bank*, just as it had for original jurisdiction in *Merrell Dow*, where Congress has not provided a federal private right of action for violation of the particular federal statute.

ARGUMENT

I. THE FEDERAL DISTRICT COURTS MAY NOT EXERCISE REMOVAL JURISDICTION BASED SOLELY ON THE PRESENCE OF A SUBSTANTIAL FEDERAL QUESTION ASSERTED IN THE STATE LAW CLAIM FOR RELIEF UNLESS CONGRESS HAS CONFERRED A FEDERAL PRIVATE RIGHT OF ACTION.

In the absence of diversity, a civil action filed in a state court may be removed to federal court only if the claim is one "arising under" federal law. *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003), *citing* 28 U.S.C. § 1441(b). Whether a claim arising under federal law must be determined by applying the "well-pleaded complaint" rule. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Thus, a claim "arises under" federal law for jurisdictional purposes only if the plaintiff's statement of his own cause of action on the face of his properly pleaded complaint affirmatively shows that it is based upon federal law. *Beneficial National Bank, supra*, at 7; *Caterpillar, supra*, at 392. As this Court has recently reaffirmed:

> As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim.

Beneficial National Bank, supra, at 7.

A. This Court's Decision in *Merrell Dow* Undermined the Continued Vitality of the "Substantial Federal Question" Doctrine.

This Court began the erosion of the "substantial federal question" doctrine as a valid exception to the well-pleaded complaint rule in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804 (1986). In the context of a district court's original jurisdiction, this Court held in *Merrell Dow*

that, absent a federal private right of action or remedy, federal courts could not exercise "arising under" jurisdiction where violation of a federal statute was an element of a state law claim. The linchpin of the *Merrell Dow* holding is the absence of a private federal cause of action for the violation of the federal law involved; in such circumstances, the violation of a federal statute, pleaded as an element of a state law cause of action, does not state a claim "arising under" federal law—"[t]he mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Id.* at 813. This Court noted that the congressional determination not to provide a private federal remedy for violation of a federal statute is "tantamount to a congressional conclusion that the presence of a claimed violation of the statute as an element of a state cause of action is insufficiently 'substantial' to confer federal question jurisdiction." *Id.* at 814.

B. The Lower Federal Courts, Including the Sixth Circuit in Other Cases, Have Consistently Applied *Merrell Dow* to Require a Federal Private Right of Action for Federal Question Jurisdiction.

Although the Sixth Circuit's decision below significantly relies on its previous ruling in *Long v. Bando Manufacturing of America, Inc.*, 201 F.3d 754 (6th Cir. 2000), five other contrary decisions by the Sixth Circuit (three of them subsequent to *Long* and before *Grable*) indicate that the Sixth Circuit properly understands *Merrell Dow* to limit this Court's prior decision in *Franchise Tax Board of Calif. v. Construction Laborers Vacation Trust for Southern Calif.*, 463 U.S. 1 (1983), by requiring a federal private right of action to confer federal question jurisdiction.

In *Heydon v. MediaOne of Southeast Michigan, Inc.*, 327 F.3d 466, 471-72 (6th Cir. 2003), the Sixth Circuit explicitly

concluded that *Merrell Dow* had limited the application of the substantial federal question exception announced in *Franchise Tax Board*, and held that "[b]ecause the Cable [Communications Policy] Act does not provide the [p]lain-tiffs] with a private cause of action, no federal question jurisdiction exists." In *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622-24 (6th Cir. 2000), the Sixth Circuit affirmed the existence of valid federal question jurisdiction over the plaintiff's claim only because it held that 47 U.S.C. § 253(c) authorizes a private right of action in federal court for claims by telecommunications providers of "barrier-to-entry" injuries:

> the Supreme Court held in *Merrill* [*sic*] *Dow* . . . that "when Congress has determined that there should be no private federal cause of action . . . [a claimed] violation does not state a [federal question]."

TCG Detroit, 206 F.3d at 622 n.2, *quoting Merrell Dow*, *supra*, 478 U.S. at 817. Similarly, in *Care Choices HMO v. Engstrom*, 330 F.3d 786, 791 (6th Cir. 2003), federal jurisdiction was found to be lacking explicitly because Section 1395mm(e)(4) of the Medicare Act did not contain a private right of action.[2]

In a fifth case decided after *Grable*, *Amsouth Bank v. Dale*, 386 F.3d 763 (6th Cir. 2004), the Sixth Circuit confirmed its correct understanding that *Merrell Dow* limits the prior holding of *Franchise Tax Board* by requiring a federal private right of action to support removal jurisdiction:

> Because the Bank Secrecy Act does not create a private right of action, the Receivers' incorporation of its standards

[2] The fourth case was decided by the Sixth Circuit prior to *Long*. In *Board of Trustees of Painesville Township v. City of Painesville*, 200 F.3d 396, 399-400 (6th Cir. 1999), the Sixth Circuit affirmed the district court's dismissal, in part, for lack of federal question jurisdiction because Sections 1255, 1282 and 1284 of the Clean Water Act did not provide plaintiffs with a private right of action.

> into a state-law cause of action cannot transform their complaint into one that raises a federal question.

Id. at 777.

Thus, in five cases decided since 1999—*Amsouth Bank*, *Heydon*, *Engstrom*, *TCG Detroit* and *City of Painesville*—the Sixth Circuit has clearly recognized the requirement of a private right of action as a prerequisite to the existence of federal question jurisdiction. To the extent that *Long* and *Grable* did not require a federal private right of action, they constitute departures from established law and ignore the limitations imposed by *Merrell Dow*.

The Courts of Appeals in ***ten*** other circuits[3] have joined the Sixth Circuit in holding that, where violation of a federal statute is a necessary element of a state law claim, the federal statute must provide a private remedy for its violation in order for federal question jurisdiction to exist.

[3] *See, e.g., PCS 2000 LP v. Romulus Telecomms., Inc.*, 148 F.3d 32, 35 (1st Cir. 1998) ("[u]nless a federal statute bestows a private right of action, courts ought to presume that Congress did not intend the statute to confer federal jurisdiction"); *City of Rome, N.Y. v. Verizon Communications, Inc.*, 362 F.3d 168, 176 (2nd Cir. 2004); *Zubi v. AT&T Corp.*, 219 F.3d 220, 223 n.5 (3rd Cir. 2000); *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811 (4th Cir. 2004) (en banc); *Mulcahy v. Columbia Organic Chem. Co., Inc.*, 29 F.3d 148, 152 (4th Cir. 1994) ("[u]nder *Merrell Dow*, if a federal law does not provide a private right of action, a state law action based on its violation does not raise a 'substantial' federal question"); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1168 (5th Cir. 1988) ("*Merrell Dow* held that a private federal remedy was a necessary predicate to determining whether the presence of a federal element in a state-created cause of action resulted in that cause of action being one which arose under federal law"); *Seinfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994)("[u]nder *Merrell Dow*, therefore, 'if federal law does not provide a private right of action, then a state law action based on its violation perforce does not raise a "substantial" federal question'"), *quoting Utley v. Varian Assoc., Inc.*, 811 F.2d 1279, 1283 (9th Cir. 1987); *Wander v. Kaus*, 304 F.3d 856, 859 (9th Cir. 2002); *Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231, 1238 (10th Cir. 2003) (since Congress did not intend to

Furthermore, numerous district court decisions within the Sixth Circuit[4] and around the country[5] have similarly held

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confer federal question jurisdiction over the construction of federal land grants, "[u]nder *Merrell Dow*, this absence is fatal"); *Dunlap v. G&L Holdings Group, Inc.*, 381 F.3d 1285, 1292 (11th Cir. 2004) ("it is now well established that federal jurisdiction is not created by the mere fact that proof of violation of a federal statute is an element of a plaintiff's state-law cause of action"), *citing Merrell Dow*, 478 U.S. at 814; *Jairath v. Dyer*, 154 F.3d 1280, 1284 (11th Cir. 1998); *Rogers v. Platt*, 814 F.2d 683, 688 (D.C. Cir. 1987). *But see Bellsouth Telecomm., Inc. v. MCImetro Access Transmission Serv., Inc.*, 278 F.3d 1223, 1234 (11th Cir. 2002) (interpreting *Merrell Dow* to allow for the possibility that there could be an "exceptional federal statute that does not provide for a private remedy but still raises a federal question substantial enough to confer federal jurisdiction when it is an element of a state cause of action"), *quoting City of Huntsville v. City of Madison*, 24 F.3d 169, 174 (11th Cir. 1994); *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 54 (2nd Cir. 1996) ("the existence *vel non* of such a private right of action is the starting point for our inquiry into the substantiality of the federal questions involved in a lawsuit"); *Howery v. Allstate Insurance Co.*, 243 F.3d 912, 918 (5th Cir. 2001).

[4] *See, e.g., Bourke v. Carnahan*, 2003 U.S. Dist. LEXIS 13399 at *16 (S.D. Ohio 7-1-03) (if the substantial federal question exception to the well-pleaded complaint rule survives after *Merrell Dow* and *Beneficial National Bank v. Anderson*, the mere construction of federal statutes as part of a state law claim, as opposed to an inquiry into the constitutionality of such statutes, "is of insufficient substances to create arising under, or federal question, jurisdiction warranting removal"); *Hunter v. Ohio Veterans Home*, 272 F. Supp.2d 692, 695 (N.D. Ohio 2003) (state cause of action for breach of contract should be handled by the state courts of Ohio because the "mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction"), *quoting Merrell Dow, supra*, 478 U.S. at 813; *Butts v. Guardian Industries Corp.*, 981 F. Supp. 1062, 1064-65 (N.D. Ohio 1997) (mere reference to federal statutes in state law claims for relief does not create federal question jurisdiction).

[5] *Meinders v. Refco Securities, Inc.*, 865 F. Supp. 721, 723 (D. Colo. 1994) ("*Merrell Dow* simply stands for the proposition that in the absence of a federal private right of action, the presence of federal law in a state law claim is insufficient to establish federal jurisdiction"); *Bhagwanani v.*

that violations of federal law may underlie many state law causes of action, but will not confer federal jurisdiction if there is no federal private right of action under the federal statute at issue.

Expert commentators have also recognized the vital importance of a private federal cause of action following *Merrell Dow*. *See, e.g.*, E. Chemerinsky, FEDERAL JURISDICTION 284-85 (3d ed. 1999) ("without a federal cause of action, a federal law cannot be the basis for federal question jurisdiction. . . . A great many federal laws do not create private causes of action. . . . After *Merrell Dow*, none of these statutes can be the basis for federal question jurisdiction").

Where defendants have attempted to remove state law claims arguing that violations of federal tax statutes transformed plaintiffs' claims into federal ones, courts have consistently held that no substantial federal question existed to support removal jurisdiction and have remanded such cases

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Howard University, 2005 U.S. Dist. LEXIS 775 at *14 (D.D.C. 1-17-05) ("[u]nder *Merrell Dow*, a complaint alleging a violation of federal law as an element of a state cause of action does not raise a substantial question of federal law when 'Congress has determined that there should be no private, federal cause of action for the violation'"), *quoting Merrell Dow*, 478 U.S. at 818; *Loussides v. America Online, Inc.*, 175 F. Supp.2d 211, 214 (D. Conn. 2001); *Neel v. Pippy*, 247 F. Supp.2d 707 (E.D. Pa. 2003); *State of Montana v. Abbot Laboratories*, 266 F. Supp.2d 250 (D. Mass. 2003); *Horowitz v. Marlton*, 116 F. Supp.2d 551, 554-55 (D.N.J. 1999); *Savalle v. Nestle Waters North America, Inc.*, 289 F. Supp.2d 31 (D. Conn. 2003); *Campbell v. SmithKline Beecham*, 919 F. Supp. 173, 176 (E.D. Pa. 1996); *Jackson v. Purdue Pharma. Co.*, 2003 U.S. Dist. LEXIS 6998 at 19-20 (M.D. Fla.); *Wagner v. Regent Inv., Inc.*, 903 F. Supp. 966, 969-70 (E.D. Va. 1995); *Handyman Network, Inc. v. Westinghouse Savannah River Co.*, 868 F. Supp. 151, 154 (D.S.C. 1994); *Casey v. Goulian*, 273 F. Supp.2d 136, 138 (D. Mass. 2003); *In re Wireless Telephone Radio Frequency Emissions Products Liab. Litig.*, 327 F. Supp.2d 554, 558-59 (D. Md. 2004); *In re Wireless Telephone Federal Cost Recovery Fees Litig.*, 343 F. Supp.2d 838, 854 (W.D. Mo. 2004).

to state court. For example, in *Smith v. Industrial Valley Title Insurance Co.*, 957 F.2d 90, 93-94 (3rd Cir. 1992), the plaintiffs filed state law claims alleging violations of Section 6045(e)(3) of the Code. Following *Merrell Dow*, the Third Circuit remanded the case to state court because there was no federal private right of action for a violation of Section 6045(e)(3). Similarly, in *Quintal v. New England Regional Council of Carpenters*, 2003 U.S. Dist. LEXIS 16386 (D. Mass. 9-18-03), the plaintiff sued his former employer in state court for over-withholding his federal and state income taxes, and the defendant removed the action to federal district court. Following *Merrell Dow*, the district court remanded the case to state court because the relevant federal tax statutes did not provide a private right of action against an employer for wrongfully withholding too much tax. *Id.* at *4.

In *Tempelman v. Colsia*, 2002 U.S. Dist. LEXIS 19037 (D.N.H. 9-26-02), the defendant even attempted to re-characterize plaintiff's state law quiet title claim as really being a tax refund suit. The district court disagreed and remanded the case to state court for lack of federal question jurisdiction.

Finally, in another recent decision, the Middle District of Florida likewise held it did not have valid original federal question jurisdiction where the plaintiff's state law claims implicated federal tax issues. *Jacoboni v. KPMG LLP*, 314 F. Supp.2d 1172, 1181 n.11 (M.D. Fla. 2004) ("[t]he Court is unpersuaded that it should allow the state law claims to remain here [under supplemental jurisdiction] on the asserted basis that they involve some issues of federal tax law. This Court is no tax court. Any such issues can be handled equally well by a judge of the state court bench. In any event, any marginally greater familiarity this Court might have with tax issues is overbalanced by a state court judge's familiarity with predominant issues of state law").

Therefore, after *Merrell Dow* as properly understood and applied, where Congress has not provided a federal private right of action for the violation of a federal statute, a complaint alleging such a violation as an element of a state law cause of action no longer states a claim "arising under" federal law pursuant to 28 U.S.C. § 1331.[6]

C. This Court's Decision in *Beneficial National Bank v. Anderson* Removed Any Doubt about the Elimination of the Substantial Federal Question Doctrine as a Basis for Removal Jurisdiction by Holding that, Absent Diversity, There Are Only Two Ways a State Claim Can be Removed to Federal Court—Where Congress Expressly Provides or Where Complete Preemption is Present.

In *Beneficial National Bank*, this Court reaffirmed the principle that the mere presence of a federal statute in an action that seeks relief solely under state law, even one that "preempts" state law, will ***not*** provide a basis for removal jurisdiction. 539 U.S. at 7. This Court explicitly held that "a

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[6] Indeed, even when Congress does create a private cause of action for the violation of a federal law, the lower courts have consistently held that, "[if a] particular plaintiff is barred from bringing the private, federal cause of action, either substantively or procedurally, no federal subject matter jurisdiction exists over that plaintiff's state cause of action predicated on the violation of the same federal law." *Dixon v. Coburg Dairy*, 369 F.3d at 818; *see also Jairath v. Dyer*, 154 F.3d at 1283 & n.9 (finding no federal removal jurisdiction where "a private cause of action under the [federal statute] is available as an abstract matter," but "this particular plaintiff . . . has no standing to pursue the only federal private cause of action available"); *Seinfeld v. Austen*, 39 F.3d at 764 n.3 (rejecting defendant's argument "that federal law need not specifically grant these plaintiffs a private right of action as long as someone has been granted such a right in the statute"); *Mulcahy v. Columbia Organic Chem. Co.*, 29 F.3d at 152 ("because the [federal] remedy sought is unavailable here, a private cause of action under *Merrell Dow* does not, in truth, exist").

state claim may be removed to federal court in only two circumstances—when Congress expressly so provides, as in the Price-Anderson Act, or when a federal statute wholly displaces the state-law cause of action through complete preemption." *Id.* at 8 (citation and footnote omitted) (emphasis supplied).

By emphasizing that, in the absence of diversity, a state claim may be removed to federal court in only two circumstances, *Beneficial National Bank* does for removal jurisdiction what *Merrell Dow* effectively accomplished for original jurisdiction—it eliminates the use of a substantial federal question, without more, as a basis for federal removal jurisdiction of a state law claim.

A number of lower courts have similarly understood this Court's decision in *Beneficial National Bank*, but are obviously seeking explicit guidance from this Court on the issue. For instance, in the wake of the *Beneficial National Bank* decision, the Second Circuit has refused to apply the substantial federal question doctrine to support removal jurisdiction. *See City of Rome, N.Y. v. Verizon Communications, Inc.*, 362 F.3d 168, 176 (2nd Cir. 2004). In *Bourke v. Carnahan, supra*, after canvassing the pre-*Beneficial National Bank* case law and trying to reconcile the Sixth Circuit's application of the "uncertain" substantial federal question exception in *Long v. Bando* with *Merrell Dow* and cases decided by other federal courts, District Judge Frost concluded that:

> *Beneficial National Bank* apparently resolves much of the [former] uncertainty that has surrounded the validity of the substantial federal question exception. Although only the dissent targeted this point, the *Beneficial National Bank* majority effectively reconsidered removal jurisprudence. By recognizing removal ***only*** in cases involving a congressional mandate or complete preemption, ***the Court arguably eliminated the substantial federal question exception***.

Bourke v. Carnahan, 2003 U.S. Dist. LEXIS 13399 at *10 (S.D. Ohio) (first emphasis in original; second emphasis supplied). *See also Burton v. Southwood Door Company*, 305 F. Supp.2d 629, 633 n.4 (S.D. Miss. 2003) ("[w]hether the presence of a 'substantial federal question' in a given case remains a proper basis for removal would seem somewhat in doubt in light of the Supreme Court's declaration in *Beneficial National Bank v. Anderson* that 'a state claim may be removed to federal court in only two circumstances – when Congress expressly so provides . . . [or] through complete preemption'") (citation omitted).

D. *Grable*'s Three-Part Analysis Contains Two More Fundamental Flaws.

Grable sets forth a unique tripartite analysis for federal question jurisdiction over state law claims: "a federal question may arise out of a state law case or controversy if the plaintiff asserts a federal right that 1) involves a substantial question of federal law; 2) is framed in terms of state law; and 3) requires interpretation of federal law to resolve the case." *Grable*, 377 F.3d at 595, *citing Long v. Bando*, 201 F.3d 754, 759 (6th Cir. 2000); *Howery v. Allstate Insurance Co.*, 243 F.3d 912, 918 (5th Cir.), *cert. denied*, 534 U.S. 993 (2001); and *Seinfeld v. Austen*, 39 F.3d 761, 763 (7th Cir. 1994), *cert. denied sub nom. Abbott Lab. v. Seinfeld*, 514 U.S. 1126. The Court in *Grable* proceeded to conclude that whether a "substantial question of federal law" is presented in a state law claim functionally turns on identifying a "substantial federal interest." 377 F.3d at 596. As the Sixth Circuit concluded: "In sum, Grable's quiet title action presents a federal question because it is rooted in the Internal Revenue Code, the correct interpretation of which represents a substantial federal interest." *Id.*

There are two additional errors in the Sixth Circuit's flawed three-part analysis. First, the Seventh Circuit in *Seinfeld v. Austen* does not support the holding in *Grable*; in fact, on the page following the page cited by the Sixth Circuit in *Grable*, the Seventh Circuit in *Seinfeld* requires, consistent with the analytical framework for which *amici* argue, the presence of a federal private right of action in order to find federal question jurisdiction. *See* 39 F.3d at 764. Furthermore, although the *Howery* case is cited correctly, it has been contradicted by three other Fifth Circuit decisions, two of which were decided since *Howery*. *See Hoskins v. Bekins Van Lines*, 343 F.3d 769, 772-73 (5th Cir. 2003); *Terrebonne Homecare, Inc. v. SMA Health Plan, Inc.*, 271 F.3d 186, 188-89 (5th Cir. 2001); *Waste Control Specialists, LLC v. Envirocare of Texas, Inc.*, 199 F.3d 781, 784 (5th Cir. 2000). All three recent Fifth Circuit decisions hold, consistent with *Beneficial National Bank*, that the complete preemption doctrine is the ***only*** exception to the well-pleaded complaint rule. In *Grable*, however, the Sixth Circuit apparently labors under the mistaken belief that the Fifth Circuit accords continuing vitality to a "substantial federal question" exception to the well-pleaded complaint rule.

Second, *Grable*'s holding that a "substantial federal interest" is sufficient to trigger federal question jurisdiction even in the absence of a private right of action has been explicitly rejected by both the Tenth Circuit and, significantly, an earlier Sixth Circuit decision. *See Nicodemus v. Union Pacific Corp.*, 318 F.3d 1231, 1236-38 (10th Cir. 2003) (although there is substantial federal interest in railroad rights-of-way, there is no federal jurisdiction without federal private right of action); *Board of Trustees of Painesville Township v. City of Painesville*, 200 F.3d 396, 400 (6th Cir. 1999), *citing Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1250 (6th Cir. 1996).

Inasmuch as the Sixth Circuit in *Grable* has apparently misunderstood the import of this Court's decisions in *Merrell Dow* and *Beneficial National Bank* and stands in conflict with the overwhelming majority of decisions in eleven federal appellate circuits, including the Sixth Circuit, further guidance from this Court as to the correct interpretation and proper scope of federal "arising under" jurisdiction would be beneficial, particularly as it relates to removal jurisdiction. If this Court finds the decision by the Sixth Circuit in this case to misapprehend or misapply the teachings of *Merrell Dow* and *Beneficial National Bank* undermining the continuing vitality of the substantial federal question doctrine, and if this Court concludes that the violation of a federal statute as an element of a state law cause of action does not support federal question jurisdiction where Congress has not created a corresponding federal private right of action, *amici* respectfully submit that the lower courts would benefit from this Court's further elucidation of the subject.

CONCLUSION

The judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

ERIC H. ZAGRANS *
WOMBLE CARLYLE SANDRIDGE
& RICE PLLC
1401 Eye Street, N.W.
Washington, D.C. 20005-2225
(202) 857-4400

THOMAS R. THEADO
GARY, NAEGELE & THEADO
446 Broadway
Lorain, Ohio 44052-1797
(440) 244-4809

DENNIS P. BARRON
P.O. Box 8190
Cincinnati, Ohio 45208
(513) 871-2369

EBEN O. MCNAIR IV
DANIEL S. WHITE
SCHWARZWALD & MCNAIR
616 Penton Media Building
1300 East Ninth Street
Cleveland, Ohio 44114-1503
(216) 566-1600

* Counsel of Record

Counsel for Amici Curiae